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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 487

CANADA MALTING COMPANY, LTD., PETITIONER,

vs.

PATERSON STEAMSHIPS, LTD.

No. 488

BRITISH EMPIRE GRAIN COMPANY, LTD., PETITIONER,

vs.

PATERSON STEAMSHIPS, LTD.

No. 489

HENRY K. STARNES, DOING BUSINESS AS H. K. STARNES & COMPANY, PETITIONER,

vs.

PATERSON STEAMSHIPS, LTD.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 27, 1931

CERTIORARI GRANTED NOVEMBER 30, 1931

(36,301, 36,302, 36,303)

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[fol. 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

CANADA MALTING COMPANY, LIMITED, Libellant-Appellant,

vs.

PATERSON STEAMSHIPS, LIMITED, Respondent-Appellee

BRITISH EMPIRE GRAIN COMPANY, LIMITED, Libellant-Appellant,

vs.

PATERSON STEAMSHIPS, LIMITED, Respondent-Appellee

HENRY K. STARNES, Libellant-Appellant,

vs.

PATERSON STEAMSHIPS, LIMITED, Respondent-Appellee

STATEMENT UNDER RULE IV, SECTION 1, SUBDIVISION 1 OF THE RULES IN ADMIRALTY OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

The suit of Canada Malting Company, Limited, was commenced by the filing of libel on July 21, 1930, and the attachment under a writ of foreign attachment of the Steamer [fol. 2] "Lachinedoc", the property of the respondent which was released from the attachment through the filing of a stipulation in the sum of Forty Thousand Dollars ($40,000.00) by the respondent.

The suit of British Empire Grain Company, Limited, was commenced by the filing of libel on July 21, 1930, and the attachment under a writ of foreign attachment of the steamer "Lachinedoc" the property of the respondent which was released from the attachment through the filing of a stipulation in the sum of Twelve Thousand Five Hundred Dollars ($12,500.00) by the respondent.

The suit of Henry K. Starnes was commenced by the filing of libel on July 22, 1930. Stipulation in the sum of Seven Thousand Five Hundred Dollars ($7,500.00) in lieu of attachment was filed by the respondent.

The names of the original parties are Canada Malting Company, Limited against Paterson Steamships, Limited; British Empire Grain Company, Limited, against Paterson Steamships, Limited; Henry K. Starnes, against Paterson Steamships, Limited. No change of parties has taken place.

In each of said suits a notice of appearance was filed on July 24, 1930, by the respondent-appellee.

In each of said suits on September 9, 1930, exceptions to the libels were filed by the respondent.

[fol. 3] In each of said suits on September 9, 1930, a suggestion was filed by the respondent that the District Court ought not to entertain or exercise further jurisdiction.

In each of said suits on September 9, 1930, a notice of motion was served and filed based upon affidavits and said exceptions and suggestion praying that the District Court exercise discretion and refuse to take and entertain further jurisdiction, dismiss the libel and vacate writ of foreign attachment, remit libellant to remedies in the Courts of the Dominion of Canada, direct that bond and stipulation for the release of the Steamer "Lachinedoc" be cancelled and discharged, and for such other and further relief as might be incidental or proper in the premises.

Said motions were heard by Honorable John R. Hazel on September 22, 1930. On October 6, 1930, opinion of Judge Hazel was filed granting respondent's motions.

Petition of the libellants for rehearing was filed October 30, 1930. On January 3, 1931, opinion of Judge Hazel on the petition for rehearing was filed amending his first opinion but adhering to decision granting respondent's motions.

Final decrees were entered January 21, 1931.

No question was referred to a commissioner or commissioners.

Notice of appeal was filed March 25, 1931, in each suit.

[fol. 4] IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

LIBEL OF CANADA MALTING COMPANY, LIMITED

To the Honorable the District Judges of the United States for the Western District of New York.

The libel of Canada Malting Company, Limited, in a cause of collision and damage, civil and maritime, against

Paterson Steamships, Limited, respectfully shows and alleges as follows:

First. That libellant is and at all times herein mentioned was a corporation duly organized and existing under and by virtue of the Laws of the Dominion of Canada.

Second. That Paterson Steamships, Limited, is and at all times hereinafter mentioned was a corporation organized and existing under and by virtue of the Laws of the Dominion of Canada, and is and at all times hereinafter mentioned was the owner and operator of the Steamer "Mantadoc."

Third. That heretofore and on or about the 9th day of July, 1930, the libellant shipped on board the steamer "Yorkton" at Port Arthur, Ontario, 67,346 bushels of Barley, in good order and condition to be transported in said steamer and delivered to the order of libellant at Montreal, Canada, and that libellant is and at all times herein mentioned was the sole owner of said Barley.

Fourth. That the said Steamer "Yorkton" sailed from Port Arthur on July 9, 1930 with said shipment of Barley [fol. 5] on board, and that while on said voyage and at about 11:22 P. M. when about 3 miles northwest of Whitefish Point on Lake Superior, in American waters, in a dense fog, said Steamer "Yorkton" was struck by the Steamer "Mantadoc" so that the Steamer "Yorkton" commenced to fill with water, and the water flooded her fires and she commenced to sink and after being taken in tow by the Steamer "Mantadoc" she did sink on the beach, a short distance below Whitefish Point on the American shore, and the said shipment of barley became a total loss.

Fifth. That at the time of said collision said Steamer "Yorkton" was running under reduced speed and those on board the Steamer "Yorkton" had made out the fog signals of a steamer that proved to be the "Mantadoc", that said signals bore on the starboard side of the Steamer "Yorkton" and that the Steamer "Yorkton" directed her course to port in order to keep out of the way of the steamer whose signals had been heard, but that suddenly the Steamer "Mantadoc" loomed up in the fog a short distance off, coming at a high and unlawful rate of speed, and although those on the Steamer "Yorkton" endeavored

to throw her stern away from the oncoming Steamer "Mantadoc", the Steamer "Mantadoc" nevertheless came on and with her stem crashed into the starboard side of the Steamer "Yorkton" a short distance forward of her stern, and opened up the side of the Steamer "Yorkton" so that she commenced to fill and sink.

[fol. 6] Sixth. And not being informed as to all that took place on board said steamers, and reserving the right to urge such other and further faults as may appear upon a full hearing of this cause, that respondent is at fault for said collision in that those in charge of the navigation of the Steamer "Mantadoc" were guilty of faults and negligence, in that they were careless and inattentive to their duties, in that no proper lookout was maintained, in that said steamer was navigated at too great a speed in a fog, in that she did not give proper heed to the signals of the Steamer "Yorkton", in that she did not stop and reverse her engines in time as should have been done, all in violation of the law and pilot rules.

Seventh. That said collision was not the result of any fault on the part of libellant; that by reason of the premises, libellant has sustained damage in the sum of Forty Thousand Dollars ($40,000.00).

Eighth. That respondent has goods and chattels within this district, to-wit: the Steamer "Lachinedoc".

Ninth. That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore libellant prays that citations in due form of [fol. 7] law, according to the course of this Honorable Court in causes of admiralty and maritime jurisdiction, may issue against Paterson Steamships Limited, and that it by its officers may be compelled to appear and answer upon oath all and singular the matters aforesaid, and if the said corporation cannot be found within this District, that an attachment issue against its goods and chattels, and that this Honorable Court will be pleased to decree the payment of the damages aforesaid, with the costs, and

libellant may have such other and further relief as to law and justice may appertain.

Brown, Ely & Richards, 1317 Chamber of Commerce, Buffalo, N. Y., and Bigham, Englar, Jones & Houston, 64 Wall Street, New York, N. Y., Proctors for Libellant.

Duly sworn to by Laurence E. Coffey. Jurat omitted in printing.

[fol. 8] In United States District Court, Western District of New York

Canada Malting Company, Limited, Libelant,

vs.

Paterson Steamships, Limited, Respondent

Notice of Appearance

Sirs: Please take notice that Paterson Steamships Lim-
[fol. 9] ited, the Respondent above named, appears in this action and that we are retained as its proctors.

Dated Buffalo, New York, July 22nd, 1930.

Yours, etc., Stanley & Gidley, Proctors for Respondent. Office and Post-office address: 1042 Marine Trust Building, Buffalo, N. Y.

To Brown, Ely & Richards and Bigham, Englar, Jones & Houston, Proctors for Libellant.

United States District Court, Western District of New York

In Admiralty

Canada Malting Company, Ltd., Libelant,

against

Paterson Steamships Limited, Respondent

Notice of Motion to Dismiss, etc.

Sirs: Please take notice that upon the annexed affidavit [fol. 10] of Ermin Burton Sutherland, sworn to the 6th day of September, 1930, and the annexed affidavit of Wil-

liam W. Hall, sworn to the 4th day of September, 1930, and the annexed affidavit of Rufus Clement Holden, Jr., sworn to the 4th day of September, 1930, and the annexed affidavit of George D. MacDonald, sworn to the 8th day of September, 1930, and the annexed affidavit of Ellis H. Gidley, sworn to the 8th day of September, 1930, and upon the libel heretofore filed herein and the writ of foreign attachment heretofore issued out of this Court, and the return of the Marshal thereto, and upon respondent's exceptions to said libel, and upon the suggestion of Paterson Steamships Limited filed herewith, a motion will be made by the undersigned at a stated session of this Court appointed to be held for the disposition of maritime causes in the United States District Court Room in the Federal Building in the City of Buffalo, New York, on the 15th day of September, 1930, (said day being the return day of process issued under the libel filed in the above entitled action) at ten o'clock in the forenoon of that day, or as soon thereafter as Counsel can be heard, for an order and decree of this Honorable Court granting and decreeing to Paterson Steamships Limited, respondent in the above entitled action, the following relief:

1. That the Court exercise the discretion conferred upon it by operation of law and refuse to take and entertain further jurisdiction of the above entitled action.

[fol. 11] 2. That the Court dismiss the libel herein and vacate the writ of foreign attachment heretofore granted and served herein at the Port of Buffalo upon the Steamer Lachinedoc, the property of Paterson Steamships Limited, on or about the 21st day of July, 1930.

3. That the Court remit libelant to its remedies in the Courts of the Dominion of Canada.

4. That the Court direct that the bond and stipulation heretofore given and filed herein by Paterson Steamships Limited with American Surety Company of New York, as surety, for the release of the Steamer Lachinedoc from arrest and attachment under the writ of foreign attachment heretofore issued and served herein upon the prayer of libelant, be cancelled and discharged of record and that the Clerk of this Court so mark said bond and stipulation.

5. That the Court grant a decree to Paterson Steamships Limited for such other and further relief herein as may be incidental thereto or proper in the premises.

Yours, etc., Stanley & Gidley, Proctors for Respondent, Paterson Steamships, Limited.

To May C. Sickmon, Clerk of the Court; Brown, Ely & Richards, and Bigham, Englar, Jones & Houston, Proctors for Libellant.

[fol. 12] IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

In Admiralty

CANADA MALTING COMPANY, LTD., Libelant,

against

PATERSON STEAMSHIPS LIMITED, Respondent

SUGGESTION

To the Honorable the Judges of the United States District Court for the Western District of New York:

Paterson Steamships Limited, a corporation of the Dominion of Canada, named as respondent herein, respectfully suggests to this Honorable Court that this Honorable Court ought not entertain or exercise further jurisdiction over the above entitled action, for the reason that it appears upon the face of the libel herein and from the moving papers attached hereto, that the matters and things complained of by libelant, which is a citizen and subject of the Dominion of Canada, against respondent, which is also a citizen and subject of the Dominion of Canada, arose out of a collision between a vessel of Canadian registry, with another vessel of Canadian registry, while carrying cargo [fol. 13] owned by a Canadian citizen and being transported from one Canadian port to another Canadian port, all of which matters and things are properly the subjects of hearing and determination by the Courts of the Dominion of Canada, in accordance with the statutes and rules of

law of the Dominion of Canada in such case made and provided.

Wherefore Paterson Steamships Limited prays that this Honorable Court will refuse to entertain or exercise further jurisdiction herein; that the libel herein be dismissed and that the writ of foreign attachment heretofore served herein be vacated, and the bond heretofore given herein be cancelled of record; and that libelant be remitted to the Courts of the Dominion of Canada for the exercise of the remedies there afforded it.

Paterson Steamships Limited, by E. B. Sutherland.

Duly sworn to by E. B. Sutherland. Jurat omitted in printing.

[fol. 14] IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

In Admiralty

CANADA MALTING COMPANY, LTD., Libelant,

against

PATERSON STEAMSHIPS LIMITED, Respondent

EXCEPTIONS TO LIBEL

To the Honorable the Judges of the United States District Court for the Western District of New York:

The exceptions of Paterson Steamships Limited, respondent in the above entitled action to the libel of Canada [fol. 15] Malting Company, Ltd., alleges:

I. That upon the facts alleged in the libel herein this Honorable Court ought not to entertain or exercise further jurisdiction over the pending action.

II. That the matters and things set forth in the libel herein constitute a matter of liability or of obligation admeasured and determinable according to the laws and statutes of the Dominion of Canada and cognizable by the Courts of the Dominion of Canada.

III. That upon the matters and things set forth in the libel herein, libelant ought to be remitted to the Courts of the Dominion of Canada.

Dated Buffalo, New York, September 2nd, 1930.
Stanley & Gidley, Proctors for Respondent, Paterson Steamships Limited.

[fol. 16] IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

In Admiralty

CANADA MALTING COMPANY, LTD., Libelant,

against

PATERSON STEAMSHIPS LIMITED, Respondent

AFFIDAVIT OF ERMIN BURTON SUTHERLAND

DOMINION OF CANADA,
Province of Ontario, ss:

Ermin Burton Sutherland, being duly sworn, deposes and says that he is a resident of Fort William, Ontario, and is Secretary of Paterson Steamships Limited, respondent in the above entitled action.

That Paterson Steamships Limited is a corporation organized and existing under and by virtue of the laws of the Dominion of Canada, having its principal office at Fort William, Ontario. That Paterson Steamships Limited is engaged in the business of water transportation upon the Great Lakes, St. Lawrence River and their connecting waters, and that said Paterson Steamships Limited is the owner and operator of some thirty lake and Welland Canal [fol. 17] freight carrying vessels; that among the vessels owned and operated by Paterson Steamships Limited is the Steamer Mantadoc, a vessel of the Dominion of Canada, registered at the Port of Fort William, and bearing Canadian registry No. 116580.

That it is alleged in the libel herein that libelant is a corporation organized and existing under and by virtue of the laws of the Dominion of Canada.

That it is alleged in the libel herein that libellant was the owner of a portion of the cargo of grain laden and being transported on board the Steamer Yorkton on a voyage from Port Arthur to Montreal on or about the 9th day of July, 1930; that it is also alleged in said libel that the Steamer Yorkton and the Steamer Mantadoc were in collision on Lake Superior off Whitefish Point on the evening of the 9th day of July, 1930, and that as a result of said collision the Steamer Yorkton was later beached in a sinking condition, resulting in an alleged total loss of libelant's portion of her cargo, for which loss recovery is sought in this action for the sum of $40,000.00.

That the Steamer Yorkton is also a Canadian freight carrying vessel, being registered at the Port of Toronto Ontario, and bearing Canadian Registry No. 132060. That the Steamer Yorkton was at the time of said collision and [fol. 18] is owned and operated by the Mathews Steamship Company, Limited, a corporation organized and existing under and by virtue of the laws of the Dominion of Canada, or the laws of the Province of Ontario, and having its principal office in the City of Toronto, Ontario, and engaged in the business of water transportation upon the Great Lakes, St. Lawrence River and their connecting waters.

That it is alleged in the libel herein that that portion of the cargo owned by libelant, which was being carried and transported upon the Steamer Yorkton at the time of said collision was shipped on board said vessel at Port Arthur, Ontario, on or about the 9th day of July, 1930, for carriage and transportation to and delivery at Montreal, Quebec. That at the time of the shipment and loading of libelant's said grain on board the Steamer Yorkton a bill of lading was issued therefor on behalf of said vessel at Fort William, Ontario, which said bill of lading acknowledged the shipment of said grain on board said Steamer Yorkton for carriage and transportation to and delivery at Montreal; that the contract for the carriage of said cargo was and is subject to, and governed by the laws of the Dominion of Canada, where the said contract was made and where it was to be performed.

That the licensed officers in charge of both the Steamers Mantadoc and Yorkton were citizens and residents of the [fol. 19] Dominion of Canada; that most, if not all, of the

members of the crews of both vessels were likewise citizens and residents of the Dominion of Canada.

That this action was begun by the filing of a libel in this Honorable Court, and by the issuance and service of a writ of foreign attachment upon the Steamer Lachinedoc at the Port of Buffalo on the 21st day of July, 1930; that the Steamer Lachinedoc is a vessel of Canadian registry, owned and operated by Paterson Steamships Limited; that the master of said vessel promptly reported the attachment of said vessel to Mr. George D. MacDonald, local vessel agent of Paterson Steamships Limited, at the Port of Buffalo; that the first notice of the attachment received by Paterson Steamships Limited at its office at Fort William, Ontario, was a telegram received from said MacDonald, dated July 22nd, 1930, advising that the Steamer Lachinedoc had been libeled in Buffalo on account of the Mantadoc case, and that he was arranging for bond so that the vessel be released. That as deponent was subsequently informed Mr. MacDonald retained Messrs. Stanley & Gidley, attorneys at Buffalo, to procure the release of said vessel Lachinedoc, and that on the morning of July 22nd, 1930, Messrs. Stanley & Gidley telegraphed Paterson Steamships Limited at Fort William, Ontario, advising that they had been instructed by Mr. MacDonald to release the Steamer Lachinedoc, and that it was necessary to file bonds totalling the [fol. 20] the sum or $60,000.00, and asking that the same be arranged for through the Winnipeg representative of the Canadian Surety Company. That during said morning said bonds were arranged for, and that later in the day the Steamer Lachinedoc was released and thereupon left the Port of Buffalo and proceeded upon her pending voyage.

That no instructions were given by Paterson Steamships Limited that a general appearance be entered herein in its behalf, and Paterson Steamships Limited in filing said bonds to procure release of the Steamer Lachinedoc did not intend thereby to waive any of its rights with respect to contesting the question of the exercise of jurisdiction by this Honorable Court over the questions of fault and damage arising out of said collision between the Steamer Yorkton and the Steamer Mantadoc; that if a general appearance was entered herein it was so entered without the knowledge or authority of said Paterson Steamships Limited: That following said collision an investigation as required

by law was duly held and conducted by the Wreck Commissioner of the Dominion of Canada, and that as a result thereof said Wreck Commissioner has determined and found the masters of both the Steamer Mantadoc and the Steamer Yorkton guilty of fault, resulting in said collision, and has suspended the respective licenses of said masters for the balance of the season of navigation of 1930.

[fol. 21] That Paterson Steamships Limited have retained Messrs. Meredith, Holden, Heward & Holden, barristers and solicitors of Montreal, as its legal representatives, concerning the various questions arising out of said collision; that, as deponent is advised by Messrs. Meredith, Holden, Heward & Holden, and verily believes, if jurisdiction of the above entitled action be retained by this Court that under all the circumstances of this case this Honorable Court will be unable to do even-handed justice between the parties in accordance with the Canadian Law, to which all of the parties and vessels involved are subject.

That an action by Paterson Steamships Limited against the owners of the Steamer Yorkton, Mathews Steamship Company, Limited, in respect of the damage occasioned by the said collision has been instituted, and is now pending in the Toronto Admiralty District of the Exchequer Court of Canada, and in that action the said Court will be called upon to determine the question of liability as between the said ships and their owners, and unless this Honorable Court will refuse to entertain or exercise jurisdiction a multiplicity of actions will result.

That if this Honorable Court will refuse to exercise jurisdiction and will dismiss the libel herein and will vacate the writ of foreign attachment and cancel the bond heretofore given herein, Paterson Steamships Limited is prepared to furnish and will furnish a valid bond for a like amount in [fol. 22] any action in rem which the present libelant may institute in any Admiralty District of the Exchequer Court of Canada, as security for whatever claim in damages the libelant may have.

That the Steamer Yorkton, though now raised, has not yet been repaired, and that in deponent's opinion in her present unrepaired condition said vessel is of little or no value as she now lies at Fort William, Ontario.

Wherefore, deponent prays that an order and decree of this Court be made refusing to take and entertain juris-

diction of the pending action, dismissing the libel and vacating the writ of foreign attachment heretofore served, cancelling the bond given for the release of the Steamer Lachinedoc, remitting the libelant to its remedies in the Courts of the Dominion of Canada, and for such other and further relief as may be just and proper in the premises.

E. B. Sutherland.

Subscribed and sworn to before me this 6th day of September, 1930. F. R. Morris, Notary Public. (Notarial Seal.)

[fol. 23] IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

In Admiralty

CANADA MALTING COMPANY, LTD., Libelant,

against

PATERSON STEAMSHIPS LIMITED, Respondent

AFFIDAVIT OF WILLIAM WALTER HALL

DOMINION OF CANADA,
Province of Ontario, ss:

William Walter Hall being duly sworn deposes and says that he is a resident of Winnipeg, Manitoba, and is General Manager of Paterson Steamships Limited, respondent in the above entitled action.

The Paterson Steamships Limited is a corporation organized and existing under and by virtue of the laws of the Dominion of Canada, having its principal office at Fort William, Ontario. That Paterson Steamships Limited is engaged in the business of water transportation upon the Great Lakes, St. Lawrence River and their connecting waters, and that said Paterson Steamships Limited is the owner and operator of some thirty lake and Welland Canal freight carrying vessels; that among the vessels owned and [fol. 24] operated by Paterson Steamships Limited is the Steamer Mantadoc, a vessel of the Dominion of Canada, registered at the Port of Fort William, and bearing Canadian Registry No. 116580.

That it is alleged in the libel herein that libelant is a corporation organized and existing under and by virtue of the laws of the Dominion of Canada.

That it is alleged in the libel herein that libelant was the owner of a portion of the cargo of grain laden and being transported on board the Steamer Yorkton on a voyage from Port Arthur to Montreal on or about the 9th day of July, 1930; that it is also alleged in said libel that the Steamer Yorkton and the Steamer Mantadoc were in collision on Lake Superior off Whitefish Point on the evening of the 9th day of July, 1930, and that as a result of said collision the Steamer Yorkton was later beached in a sinking condition, resulting in an alleged total loss of libelant's portion of her cargo, for which loss recovery is sought in this action for the sum of $40,000.00.

That the Steamer Yorkton is also a Canadian freight carrying vessel, being registered at the Port of Toronto, Ontario, and bearing Canadian Registry No. 132060. That the Steamer Yorkton was at the time of said collision and is owned and operated by the Mathews Steamship Company, [fol. 25] Limited, a corporation organized and existing under and by virtue of the laws of the Dominion of Canada, or the laws of the Province of Ontario, and having its principal office in the City of Toronto, Ontario, and engaged in the business of water transportation upon the Great Lakes, St. Lawrence River and their connecting waters.

That it is alleged in the libel herein that that portion of the cargo owned by libelant, which was being carried and transported upon the Steamer Yorkton at the time of said collision was shipped on board said vessel at Port Arthur, Ontario, on or about the 9th day of July, 1930, for carriage and transportation to and delivery at Montreal, Quebec. That at the time of the shipment and loading of libelant's said grain on board the Steamer Yorkton a bill of lading was issued therefor on behalf of said vessel at Fort William, Ontario, which said bill of lading acknowledged the shipment of said grain on board said Steamer Yorkton for carriage and transportation to and delivery at Montreal; that the contract for the carriage of said cargo was and is subject to and governed by the laws of the Dominion of Canada, where the said contract was made and where it was to be performed.

That the licensed officers in charge of both the Steamers

Mantadoc and Yorkton were citizens and residents of the Dominion of Canada; that most, if not all, of the members [fol. 26] of the crews of both vessels were likewise citizens and residents of the Dominion of Canada.

That this action was begun by the filing of a libel in this Honorable Court, and by the issuance and service of a writ of foreign attachment upon the Steamer Lachinedoc at the Port of Buffalo on the 21st day of July, 1930; that the Steamer Lachinedoc is a vessel of Canadian registry, owned and operated by Paterson Steamships Limited. That the first notice deponent had of the seizure of the Steamer Lachinedoc was a telephone conversation had with Mr. MacDonald, when deponent was in Toronto on the evening of July 21, 1930; that Mr. MacDonald then advised deponent that the Steamer Lachinedoc had been libeled at Buffalo on account of the Yorkton-Mantadoc collision, and deponent instructed Mr. MacDonald to have Messrs. Stanley & Gidley arrange for a bond so that the Steamer Lachinedoc might be released immediately. That as deponent was subsequently informed Mr. MacDonald retained Messrs. Stanley & Gidley, attorneys at Buffalo, to procure the release of said vessel Lachinedoc, and that on the morning of July 22nd, 1930 Messrs. Stanley & Gidley telegraphed Paterson Steamships Limited at Fort William, Ontario, advising that they had been instructed by Mr. MacDonald to release the Steamer Lachinedoc, and that it was necessary to file bonds totalling the sum of $60,000.00, and asking that the same be arranged for through the Winnipeg representative of [fol. 27] the Canadian Surety Company. That during said morning said bonds were arranged for, and that later in the day the Steamer Lachinedoc was released and thereupon left the Port of Buffalo and proceeded upon her pending voyage.

That no instructions were given by Paterson Steamships Limited that a general appearance be entered herein in its behalf, and Paterson Steamships Limited in filing said bonds to procure release of the Steamer Lachinedoc did not intend thereby to waive any of its rights with respect to contesting the questions of the exercise of jurisdiction by this Honorable Court over the questions of fault and damage arising out of said collision between the Steamer Yorkton and the Steamer Mantadoc; that if a general appearance was entered herein it was so entered without the knowledge

or authority of said Paterson Steamships Limited. That following said collision an investigation as required by law was duly held and conducted by the Wreck Commissioner of the Dominion of Canada, and that as a result thereof said Wreck Commissioner has determined and found the masters of both the Steamer Mantadoc and the Steamer Yorkton guilty of fault, resulting in said collision, and has suspended the respective licenses of said masters for the balance of the season of navigation of 1930.

That Paterson Steamships Limited has retained Messrs. Meredith, Holden, Heward & Holden, barristers and solici-
[fol. 28] tors of Montreal, as its legal representatives, concerning the various questions arising out of said collision; that as deponent is advised by Messrs. Meredith, Holden, Heward & Holden, and verily believes, if jurisdiction of the above entitled action be retained by this Court that under all the circumstances of this case this Honorable Court will be unable to do even-handed justice between the parties in accordance with the Canadian Law, to which all of the parties and vessels involved are subject.

That an action by Paterson Steamships Limited against the owners of the Steamer Yorkton, Mathews Steamship Company, Limited, in respect of the damage occasioned by the said collision has been instituted, and is now pending in the Toronto Admiralty District of the Exchequer Court of Canada, and in that action the said Court will be called upon to determine the question of liability as between the said ships and their owners, and unless this Honorable Court will refuse to entertain or exercise jurisdiction a multiplicity of actions will result.

That if this Honorable Court will refuse to exercise jurisdiction and will dismiss the libel herein and will vacate the writ of foreign attachment and cancel the bond heretofore given herein, Paterson Steamships Limited is prepared to furnish and will furnish a valid bond for a like amount in any action in rem which the present libelant may institute
[fol. 29] in any Admiralty District of the Exchequer Court of Canada, as security for whatever claim in damages the libelant may have.

Wherefore deponent prays that an order and decree of this Court be made refusing to take and entertain jurisdiction of the pending action, dismissing the libel and vacating the writ of foreign attachment heretofore served,

cancelling the bond given for the release of the Steamer Lachinedoc, remitting the libelant to its remedies in the Courts of the Dominion of Canada, and for such other and further relief as may be just and proper in the premises.

W. W. Hall.

Subscribed and sworn to before me this 4th day of September, 1930. Ivanhoe Bissonnette, Notary. (Notarial Seal.)

[fol. 30] IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

In Admiralty

CANADA MALTING COMPANY, LTD., Libelant,

against

PATERSON STEAMSHIPS LIMITED, Respondent

AFFIDAVIT OF RUFUS CLEMENT HOLDEN, JR.

DOMINION OF CANADA,
Province of Quebec, ss:

Rufus Clement Holden, Jr., being duly sworn, deposes and says that he is a resident of the City of Montreal, Quebec, and that he is a member of the firm of Meredith, Holden, Heward & Holden, barristers and solicitors, engaged in the general practice of law in the City of Montreal, Quebec, with offices at 215 St. James Street, West.

That deponent's said firm has been retained by Paterson Steamships Limited as its local representatives for the handling and disposition of the various questions resulting from the collision between the Steamer Yorkton and the Steamer Mantadoc on Lake Superior on July 9th, 1930. [fol. 31] That deponent has had charge of the subject matter and of the various questions relating to said collision and is familiar therewith, and makes this affidavit accordingly.

That this action was brought in the United States District Court for the Western District of New York by the filing

of a libel by Canada Malting Company, Ltd., which is alleged to be a corporation of the Dominion of Canada; that it is alleged in the libel that libelant was the owner of a portion of the cargo of grain being carried on and transported by the Steamer Yorkton at the time of said collision. That it is alleged that said Steamer Yorkton was engaged in the transportation of said cargo of grain, was in collision with the Steamer Mantadoc upon the waters of Lake Superior off Whitefish Point on the evening of July 9, 1930, and that as a result thereof the Steamer Yorkton gradually sunk and was beached in a sinking condition resulting in the alleged total loss of libelant's portion of the cargo, for which recovery is sought in this action for the sum of $40,000.00.

That it is alleged therein that the Steamer Mantadoc, which is owned and operated by Paterson Steamships Limited, a corporation of the Dominion of Canada, was at fault for said collision and the resultant damage; that it is further alleged that the portion of said cargo of grain owned by libelant was laden on board the Steamer Yorkton at the Port of Port Arthur, Ontario, for carriage [fol. 32] and transportation to and delivery at the Port of Montreal, Quebec.

That as appears by the affidavit of Ermin Burton Sutherland, sworn to the — day of September, 1930, and the affidavit of William W. Hall, sworn to the 4th day of September, 1930, annexed hereto and made a part of these motion papers, the Steamer Yorktown is a vessel of Canadian registry, owned and operated by Mathews Steamship Company, Ltd., a Canadian corporation, and the Steamer Mantadoc is likewise a vessel of Canadian registry; that as also appears by said affidavits a bill of lading was issued for the carriage of said libelant's portion of said cargo of grain at Fort William, Ontario; that the contract for the carriage of said cargo was and is subject to, and governed by the laws of the Dominion of Canada, where the said contract was made and where it was to be performed.

That as also appears by said affidavits the licensed officers in charge of both Steamers Mantadoc and Yorkton were citizens and residents of the Dominion of Canada, and that most, if not all, of the members of the crews of both vessels

were likewise citizens and residents of the Dominion of Canada.

That as further appears by said affidavits following said collision an investigation as required by law was duly held by the Wreck Commissioner of the Dominion of Canada, and that as a result said Wreck Commissioner determined [fol. 33] and found the masters of both the Steamer Mantadoc and the Steamer Yorkton guilty of fault, resulting in the collision, and suspended the respective licenses of said masters for the balance of the season of navigation of 1930.

That as deponent is advised by Messrs. Stanley & Gidley, local counsel for Paterson Steamships Limited at Buffalo, and verily believes this action was begun by the filing of a libel in personam on or about the 21st day of July, 1930, and the service of a writ of foreign attachment upon the Steamer Lachinedoc, a vessel of Canadian registry, owned by Paterson Steamships Limited, while said Steamer Lachinedoc was engaged in loading cargo at the Dakota Elevator in the Port of Buffalo.

That in an action of this nature pending in the Courts of the Dominion of Canada, the rule of law is that a cargo owner, in case of mutual fault on the part of both vessels, can only recover a moiety of his loss from the vessel colliding with the vessel upon which his cargo is being transported. That accordingly if this action was pending in the Courts of the Dominion of Canada and both ships were found in fault libelant would be able in no event to recover more than one-half of its damage as against the Steamer Mantadoc, and her owners, Paterson Steamships Limited. [fol. 34] That under Canadian Law the Steamer Yorkton and her owners could limit their liability only to an aggregate amount equivalent to $38.92, for each ton of the said Steamer Yorkton's registered tonnage with the addition of any engine-room space deducted for the purpose of ascertaining that tonnage.

That an action by the owners of the said Steamship Mantadoc, Paterson Steamships Limited, against the owners of the said Steamer Yorkton, Mathews Steamship Company, Limited, for the damages occasioned by the collision in question has been instituted and is pending in the Toronto Admiralty District of the Exchequer Court of Canada, and in that action the said Court will be called upon to

determine the question of liability as between the said ships and their owners.

R. Clement Holden, Jr.

Subscribed and sworn to before me at Montreal, Province of Quebec, Canada, this 4th day of September, 1930. Ivanhoe Bissonnette, Notary. (Notarial Seal.)

[fol. 35] In United States District Court, Western District of New York

In Admiralty

Canada Malting Company, Ltd., Libelant,

against

Paterson Steamships Limited, Respondent

Affidavit of George D. MacDonald

State of New York,
County of Erie, ss:

George D. MacDonald, being duly sworn, deposes and says that he is a resident of the City of Buffalo, New York; that he is engaged in the business of water transportation, and that he is local vessel agent for Paterson Steamships Limited at the Port of Buffalo, and was such on the 21st day of July, 1930.

That my duties as such vessel agent generally consist of seeing that vessels of that fleet coming into that Port receive proper dispatch in loading and unloading cargoes in the Port of Buffalo and also in transmitting orders from the owners to the masters of said ships.

[fol. 36] That on the 21st day of July, 1930, some time after four o'clock in the afternoon, I was advised that the Steamer Lachinedoc, then lying at the Dakota Elevator loading cargo had been attached by the United States Marshal for the Western District of New York under process issued out of this Honorable Court. I at once got in touch with Messrs. Stanley & Gidley, attorneys, with offices in the Marine Trust Building, Buffalo, and advised them of

such attachment, and informed them that it was desired to procure the release of said vessel from attachment at once, so that she would not be delayed in starting upon her then pending voyage. Mr. Otten of their office advised me that it was then too late in th day to procure any bond or to release the vessel, but that they would proceed promptly to obtain and file bond on the following morning. That in the evening I talked by telephone to Mr. William W. Hall, General Manager of Paterson Steamships Limited, who was then at Toronto, and advised him of the seizure of the Steamer Lachinedoc, and that I had taken the matter up with Messrs. Stanley & Gidley, with a view of procuring her release, and he instructed me to have Messrs. Stanley & Gidley obtain and file bond for the release of the Steamer Lachinedoc. Accordingly on the following morning I telegraphed Paterson Steamships Limited at Fort William, Ontario, that I had so advised Mr. Hall at Toronto, and that I was arranging bond so as to release the vessel promptly.

[fol. 37] The bond was obtained about two o'clock on the 22nd day of July, 1930, and the Steamer Lachinedoc was released, and thereupon left the port on the afternoon of that day.

I neither received nor gave any instructions other than as related above, and I had no authority as local vessel agent to do more than to facilitate the movement of the Steamer Lachinedoc when attached under the process of this Honorable Court.

George D. MacDonald.

Subscribed and sworn to before me this 8th day of September, 1930. Arthur E. Otten, Notary Public in and for Erie County, New York.

[fol. 38] IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

In Admiralty

CANADA MALTING COMPANY, LTD., Libelant,

against

PATERSON STEAMSHIPS LIMITED, Respondent

AFFIDAVIT OF ELLIS H. GIDLEY

STATE OF NEW YORK,
County of Erie, ss:

Ellis H. Gidley being duly sworn, deposes and says that he is a resident of the City of Buffalo, New York, and is an attorney at law and a member of the firm of Stanley & Gidley, attorneys, with offices at 1042 Marine Trust Building, Buffalo, New York.

That on or about the 21st day of July, 1930, deponent's said firm was directed by Mr. George D. MacDonald to procure the release of the Steamer Lachinedoc from attachment at the Port of Buffalo upon a writ of foreign attachment issued in the above entitled action, and that deponent has had the subject matter in charge and is familiar therewith, and makes this affidavit accordingly.

[fol. 39] That following Mr. MacDonald's instructions deponent's said firm telegraphed Paterson Steamships Limited at Fort William, on the morning of July 22nd, 1930, that they had been so instructed, and that bonds were required in a total sum of $60,000.00, to release the Steamer Lachinedoc, and asked that said bonds be arranged through the Canadian Surety Company's representative at Winnipeg. That meanwhile deponent obtained copies of the libel from Messrs. Brown, Ely and Richards, proctors for libelant, and learned that two libels had been filed in this Court, one filed by Canada Malting Company, Ltd., seeking recovery of damage in the sum of $40,000.00, and one filed by British Empire Grain Company Limited, seeking recovery of damage in the sum of $20,000.00. That thereafter and about noon of said day deponent was informed by Messrs. Brown, Ely & Richards that they were filing a third libel for a similar cause of action in favor of Henry

K. Starnes, doing business as H. K. Starnes & Company, seeking recovery of the sum of $7,500.00, and that they were desirous of amending the libel filed by British Empire Grain Company so as to seek to recover only $12,500.00 therein.

That about the same time deponent was notified by the Buffalo Manager of the American Surety Company of New York that he had received authority to execute said bonds, and thereupon deponent drafted three separate bonds, one in favor of Canada Malting Company, Ltd., in the sum of [fol. 40] $40,000.00, one in favor of British Empire Grain Company Limited for the sum of $12,500.00, and one in favor of Henry K. Starnes, doing business as H. K. Starnes & Co., in the sum of $7,500.00, and procured the execution of the same, and after securing the approval of Messrs. Brown, Ely & Richards thereto filed the same in this Court together with a notice of appearance in each of said actions. Thereupon the Steamer Lachinedoc was released from attachment and immediately proceeded upon her then pending voyage.

That as appears from the libel herein, this action is brought by a corporation of the Dominion of Canada against a corporation of the Dominion of Canada. Recovery is sought herein for the alleged loss of a portion of cargo of grain being carried on the Steamer Yorkton as the result of the sinking of the Steamer Yorkton in the waters of Lake Superior on July 9th, 1930, following a collision between the Steamer Yorkton and the Steamer Mantadoc, owned by the respondent herein.

That the rule of law as applied in the Courts of Admiralty in the United States permits an owner of cargo laden upon one of two vessels involved in a collision to sue either one or both vessels, or the owners thereof, at his election; and, if such cargo owner did not contribute to the disaster, permits his recovery, in either event, of the full amount of his loss notwithstanding that the collision [fol. 41] be held to be due to mutual fault. That it results that if this Honorable Court retains jurisdiction of this action and applies the United States rule of damage that Paterson Steamships Limited, if fault be found, would be held liable herein for the full amount of cargo owner's damage, even though it be found that both the Steamer Mantadoc and the Steamer Yorkton were mutually at fault.

That if said Paterson Steamships Limited be condemned herein for the full amount of cargo owner's damage, Paterson Steamships Limited probably would not be able to exercise any remedy by way of recoupment against the Steamer Yorkton, and her owners, for the reason that the Steamer Yorkton, as well as the other vessels owned by Mathews Steamship Company, Ltd., are of Canadian registry, and usually trade between Canadian ports, and that it would be highly improbable that this Honorable Court could secure jurisdiction over the Steamer Yorkton, and her owners, or that said vessel, or her owners, could be effectively brought into this litigation by the exercise of Rule 56 of the Admiralty Rules of the United States. That even if the Steamer Yorkton, or other property of her owners, were found within the jurisdiction of this Honorable Court, and were effectively brought into this litigation as parties thereto, and a finding of mutual fault thereafter resulted with a decree of divided damage between the Steamer Yorkton and the Steamer Mantadoc, the liability of the Steamer Yorkton, and her owners, for the amount of cargo [fol. 42] owner's loss and damage so found could be limited under the statutes of the United States to the value of the res plus the pending freight immediately following the disaster.

That as deponent is informed and believes, following said collision the Steamer Yorkton was abandoned by her owners as a constructive total loss as she lay sunk in the waters of Lake Superior; that said vessel has now been raised and towed to Port Arthur, Ontario, but is seriously damaged, and in her present unrepaired condition is of little or no value; that it follows that the value of said vessel immediately following the disaster, exclusive of her pending freight, would be little or nothing, and that if her value in her salved condition, as now existing at the port of Port Arthur, Ontario, be taken there must be deducted therefrom the expenses of salvage of said vessel and towage from the point of disaster to Port Arthur, Ontario, and that by reason of the application of the limitation of liability statute of the United States to cases of foreign owned vessels the result would be that the Steamer Yorkton, and her owners, could escape liability in the United States Court against any recoupment that Paterson Steamships Limited might be entitled to enforce against

said vessel and her owners, and that the Steamer Mantadoc, and her owners, would thus be required to pay the full amount of cargo owner's loss and damage, leaving it without an effective remedy in the premises against the Steamer Yorkton and her owners.

[fol. 43] It follows that Paterson Steamships Limited, if jurisdiction be retained by this Court herein, will not dare to implead the Steamer Yorkton, or her owners, in the pending action, assuming that jurisdiction of said vessel, or her owners, could be secured for the reason that the Steamer Yorkton, and her owners, would thus be enabled to escape the payment of any substantial amount of recoupment decreed against them in favor of Paterson Steamships Limited, as a result of the matters and things set forth in the libel herein, through the exercise of such limitation of liability.

Accordingly, if jurisdiction be retained herein by this Honorable Court, and Paterson Steamships Limited be condemned in accordance with the rule of damage as applied in the United States Courts said Paterson Steamships Limited will be called upon to pay the full amount of loss and damage sustained by libelant as a result of the matters and things complained of in the libel herein, and will be left without an effective remedy against the Steamer Yorkton, and her owners, which may be enforced in the Courts of the United States.

That if jurisdiction be retained by this Honorable Court and the Canadian rule of damage in favor of cargo owner be applied Paterson Steamships Limited by reason of the fact that the officers and members of the crew of the [fol. 44] Steamer Yorkton are citizens and residents of the Dominion of Canada will be unable to exercise jurisdiction over them, and to compel such officers and members of the crew of the Steamer Yorkton to testify herein, and that as a result Paterson Steamships Limited will be left without any effectual remedy towards showing fault upon the part of the Steamer Yorkton as the cause of such collision and resultant damage.

That since it appears upon the face of the libel herein and from the affidavits submitted herewith that both the libelant and respondent are non-resident corporations and subjects of the Dominion of Canada, that the contract of carriage was made by the libelant, a Canadian corpora-

tion, with a Canadian owned and registered vessel, under a bill of lading subject to the Canadian statutes; that the contract of carriage was to be performed between two ports in the Dominion of Canada, and no part of the same was to be executed within the United States, and that it is governed by the law of the Dominion of Canada; that the collision took place between two vessels owned by subjects of the Dominion of Canada, and that nearly, if not all, of the witnesses were residents and citizens of the Dominion of Canada, if jurisdiction be retained by this Honorable Court it will result that this Honorable Court will not be able to do even-handed justice to the parties in accordance with the law of the Dominion of Canada. That, by reason of the matters and things hereinbefore set forth, the con- [fol. 45] venience of the parties will be greatly served by the trial and disposition of the pending cause in the Courts of the Dominion of Canada, rather than within this jurisdiction.

That as appears by the affidavit of Ermin Burton Sutherland, submitted herewith, that an action by Paterson Steamships Limited against the owners of the Steamer Yorkton, Mathews Steamship Company Limited, in respect of the damage occasioned by the said collision has been instituted, and is now pending in the Toronto Admiralty District of the Exchequer Court of Canada, and in that action the said Court will be called upon to determine the question of liability as between the said ships and their owners, and unless this Honorable Court will refuse to entertain or exercise jurisdiction a multiplicity of actions will result.

That if this Honorable Court will refuse to exercise jurisdiction and will dismiss the libel herein and will vacate the writ of foreign attachment and cancel the bond heretofore given herein, Paterson Steamships Limited is prepared to furnish, and will furnish, a valid bond for a like amount in any action in rem which the present libelant may institute in any Admiralty District of the Exchequer Court of Canada, as security for whatever claim in damages the libelant may have.

That when libelant placed its grain on board a Canadian [fol. 46] registered vessel for carriage between two Canadian ports under a contract of carriage subject to Canadian Law, it thereby subjected itself to the law of Canada: and the matter of liability or obligation, and the extent

thereof, as determined by the law of Canada should bind libelant in seeking recovery for the amount of its loss or damage, and the right of Paterson Steamships Limited to have such law and obligation enforced should not be denied. It, therefore, follows that this Court in the exercise of its equitable powers and of the discretion vested in it as to the exercise of jurisdiction herein should decline to take or entertain jurisdiction herein, and should remit the parties to the Courts of the Dominion of Canada taking cognizance of the matters and things hereinbefore set forth.

That this motion is made upon the return day of process issued under the libel herein and prior to respondent having filed any answer to said libel in this Court.

That attached hereto and make a part hereof by reference is a copy of the report of the Dominion Wreck Commissioner made as a result of investigation held at the City of Toronto on July 23rd, 24th and 25th, 1930, into the circumstances attending the collision between the SS. Yorkton and the SS. Mantadoc. That reference is hereby made to such report in full for the purpose of showing to the Court the apparent fault upon the part of the Master of the Steamer Yorkton as well as that upon the part of [fol. 47] the Steamer Mantadoc, as a result of which such collision occurred, and that said report is hereby referred to in full and made a part hereof.

That the Rules of the Road for the Great Lakes as promulgated by Order in Council of the 4th February, 1916, and as issued by Department of Marine and Fisheries, Canada, violations of which are stated in said report to have been the cause of said collision, read as follows:

"Rule 19. Every vessel shall, in thick weather by reason of fog, mist, falling snow, heavy rainstorms, or other causes, go at moderate speed. A steam vessel hearing, apparently not more than four points from right ahead, the fog signal of another vessel shall at once reduce her speed to bare steerageway, and navigate with caution until the vessels shall have passed each other."

"Rule 22. If, when steamers are approaching each other, the pilot of either vessel fails to understand the course or intention of the other, whether from signals being given or answered erroneously, or from other causes, the pilot

so in doubt shall immediately signify the same by giving the danger signal of five or more short and rapid blasts of the whistle; and if both vessels shall have approached within half a mile of each other, both shall be immediately slowed to a speed barely sufficient for steerageway, and, if necessary, stopped and reversed, until the proper signals [fol. 48] are given, answered, and understood, or until the vessels shall have passed each other."

"Rule 23. Steam vessels are forbidden to use what has become technically known among pilots as "cross signals"—that is, answering one whistle with two, and answering two whistles with one. In all cases, and under all circumstances, a pilot receiving either of the whistle signals provided in the rules, which for any reason he deems injudicious to comply with, instead of answering it with a cross signal, shall at once sound the danger signals and observe the rule applying thereto (Rule 22)."

"Rule 30. When two steamers are approaching each other at right angles or obliquely so as to involve risk or collision, other than when one steamer is overtaking another the steamer which has the other on her own port side shall hold her course and speed; and the steamer which has the other on her own starboard side shall keep out of the way of the other by directing her course to starboard so as to cross the stern of the other steamer, or, if necessary to do so, slacken her speed or stop or reverse. The steamer having the other on her own port bow shall blow one blast of her whistle as a signal of her intention to cross the bow of the other, holding her course and speed, which signal shall be promptly answered by the other steamer [fol. 49] by one short blast of her whistle as a signal of her intention to direct her course to starboard so as to cross the stern of the other steamer or otherwise keep clear."

"If from any cause whatever the conditions covered by this situation are such as to prevent immediate compliance with each other's signals, the misunderstanding or objection shall be at once made apparent by blowing the danger signal, and both steamers shall be stopped, and backed if necessary, until signals for passing with safety are made and understood."

"Rule 32. When two steam vessels are crossing so as to involve risk of collision the vessel which has the other on her own starboard side shall keep out of the way of the other."

"Rule 34. Where, by any of the rules herein prescribed, one of the two vessels shall keep out of her way, the other shall keep her course and speed."

"Rule 35. Every steam vessel which is directed by these rules to keep out of the way of another vessel shall, on approaching her, if necessary, slacken her speed or stop or reverse."

"Rule 37. In obeying and construing these rules due regard shall be had to all dangers of navigation and collision and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger."

[fol. 50] "Rule 38. Nothing in these rules shall exonerate any vessel, or the owner or master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case."

Wherefore deponent prays for an order and decree of this Court granting the relief sought by respondent upon this motion, viz., that the Court exercise the discretion conferred upon it by operation of law and refuse to take and entertain further jurisdiction of the above entitled action; that the Court dismiss the libel herein and vacate the writ of foreign attachment heretofore granted and served herein, and that the Court remit the libelant to its remedies in the Courts of the Dominion of Canada; that the Court direct that the bond and stipulation heretofore given and filed herein by Paterson Steamships Limited, with the American Surety Company of New York, as surety, be cancelled and discharged of record, and that the respondent have such other and further relief as may be incidental thereto or proper in the premises.

Ellis H. Gidley.

Sworn to before me this 8th day of September, 1930,
Arthur E. Otten, Notary Public, Erie Co., N. Y.

[fol. 51] REPORT OF DOMINION WRECK COMMISSIONER

Re S. S. "Yorkton" vs. S. S. "Mantadoc" Collision

In the matter of a formal investigation held in the City Hall, Toronto, on July 23rd, 24th and 25th, 1930, into the circumstances attending the collision between the S. S. "Yorkton" and the S. S. "Mantadoc" off Whitefish Point, Lake Superior, on or about the 10th July, 1930, resulting in the sinking of the S. S. "Yorkton."

The Court was presided over by Captain L. A. Demers, F. R. A. S., Dominion Wreck Commissioner, assisted by Captain J. B. Foote and Captain J. H. Solery, acting as Nautical Assessors.

Mr. R. C. Holden was present on behalf of the Owners and Officers of the "Mantadoc"; Mr. L. C. Hinslea, representing the "Yorkton" and her officers; Mr. A. J. McElhinney looked after the interests of the Underwriters of the cargo of the "Yorkton."

On the 23rd of July the Master of the "Yorkton" Captain F. M. Burmister, certificate No. 11689, was examined and cross examined. He stated as follows: that the "Yorkton," owned by the Mathews Steamship Company of Toronto, was a steel built vessel, a single screw, of a speed of 9.5 miles an hour; she carried 20 of a crew, 2 certificated Deck Officers, 2 Engineers; her length was 257 feet, [fol. 52] breadth 42 feet 8 inches, draft at time of casualty 13 feet 6 inches forward and 14 feet 5 inches aft; she had 2 compasses which had been adjusted and gave a maximum deviation of one-half a degree West on the starboard; she was loaded with grain and was bound from Port Arthur to Montreal.

On the 10th of July he had passed Caribou Island which was seen at 5.54 P. M. log read, 51 miles being indicated, and the distance 8½ miles. At 9.08 p. m. log reading was 178 miles; at 10.37 the engines were checked at slow and log showed 189 miles, which was the last reading observed, fog came on thick. The course steered was SE by E¼E. He heard a Steamer's whistle ten to twelve times about four points on his starboard bow. His whistle omitted regularly the usual three blasts. Some moments before the collision he avers he gave the order to starboard, then steady, after having starboarded and having sounded three

times the two blasts, he saw a glimpse of the red light of a steamer, then the green and immediately ordered full speed ahead and a hard-to-port helm, the steamer, which proved to be the "Mantadoc," crashing into his starboard quarter in the region of the engine room, the ship listing considerably through the force or violence of the impact. He noticed that the ship was filling rapidly in the engine room and fire hold. Eventually the ship was towed by the "Mantadoc" to Whitefish Bay, the crew having been conveyed to the rescuing vessel. When she grounded she was left and abandoned.

[fol. 53] Prior to the collision and hearing what proved the "Mantadoc's" whistle, he had heard other signals. He thought he had heard also Whitefish Point fog horn, twice, but could not tell nor did not know the nature of that Point's fog signal, the intervals nor the number of blasts. Both Master and Second Mate were constantly within the wheel house, three windows being opened, also the starboard door. The Watchman kept a lookout on the bow deck.

"Mantadoc"

The evidence of C. B. Kirk, Master of the "Mantadoc" Certificate No. 8001, followed being to the effect, that: the S. S. "Mantadoc" owned by the Paterson Steamships Company, was a steel built vessel of 4466 gross, 2060 net tons register; carrying 22 men, 2 certificated Deck Officers; was 416 feet long, 50 feet beam; draft 18 feet 7 inches forward, 19 feet 4 inches aft; single screw of a speed of 10 miles; that he had loaded at Lorain some 7,000 tons of coal and was bound to Jackfish Bay. Leaving the Soo he had shaped a course N. W. by N. 7/8 N, Whitefish Point was passed at 9:55 standard time; fog set down thick, the engines were checked to half speed; heard twice the signals of two blasts from the "Yorkton" which appeared to be about one point on port bow, also had heard her three blast fog signal previously approaching. He ordered hard-to-starboard and full ahead when the "Yorkton" came in [fol. 54] sight at about 100 feet distant, the ship crashing into the starboard quarter of the "Yorkton," and full speed astern was given. The ship having cleared the "Yorkton" after some maneuvering he sent the boat to rescue the crew of the "Yorkton," after which fastening

to the side he towed the "Yorkton" to soundings where she was abandoned, bringing the crew to Sault Ste. Marie. No alarm signals were sounded nor was there a two blast signal given to correspond to the hard-to-starboard helm. He also stated that the compasses had not been adjusted since he had been in command, a season and one-half.

The other witnesses examined did not shed further light, nor alter in any material way the evidence of each Master.

After hearing the pleadings of the three Counsel, the Court adjourned at 4:30 p. m. July 25th, taking the case en delivere.

Summary

The evidence of each vessel indicates that there was a lookout kept both by the Masters and Second Officers, as well as the Watchmen on the bow deck; that the "Yorkton" was going at a slow speed or was checked, as it is termed, which, at the number of revolutions stated, would give her a speed through the water of 3 to 4 statute miles. To all intents and purposes the speed was moderate in [fol. 55] view of the dense fog which enveloped and surrounded her, and in accordance with the first sentence of Rule 19.

The fog signals of the S. S. "Mantadoc" were heard ten to twelve times at regular intervals. If so, there was a period of eight to ten minutes elapsed between the first sound and the collision, and it is averred it was heard constantly at about four points on the starboard bow. The Master said so. My notes show that he thought she was a crossing vessel. If such a thought existed it did not require much reflection or calculation to come to a conclusion that the vessel heard was crossing from starboard to port. At any rate the fact that it was determined that the bearing did not change, a danger existed and the paramount duty of the "Yorkton's" Master was to stop his engines and bring his ship to bare steerageway, maintaining his course till such a time as the heading of the "Mantadoc" would have been determined, then, if found converging and crossing, having her on his starboard bow, it was his duty to keep clear.

The error, the mistake and blunder was in blowing a two-blast signal, starboarding the helm without first having

determined the direction of the vessel which proved to be the "Mantadoc." Again when the "Mantadoc" replied to the two blast signal by a three blast signal, an alarm or danger signal should have been instantly given, instead the "Yorkton" followed the two blasts by a three-blast signal, [fol. 56] significantly conveying the message that the helm had been steadied, then followed by another two blast signal, indicating a further alteration of the helm to starboard impelling the "Yorkton" further to port—very mystifying —then when the "Mantadoc" appeared in sight a full speed ahead was ordered with a hard-to-port helm. The intention was good, but the movement could not be expected to be effective, and yet, had the "Mantadoc" been under moderate slow speed, it is very probable that a contact would have been avoided at least minimized. On this last movement no criticism is intended, as the order, well meant perhaps, was done in the agony of the moment.

From the above, I deduce that the Master failed to observe the letter and spirit of Rule 19, likewise that of Rules 30, 32 and 35.

If the "Mantadoc's" whistle was heard on the starboard at four points or more, the danger line would have been passed, therefore entitling him to a maintenance of speed and course. I doubt, in view of the evidence which indicates that but a casual observation was made of the bearing by compass, that the bearings were as stated. The fact that the bearings remained the same during an approximate three minutes proves that the "Mantadoc" was a crossing vessel, therefore, it was incumbent on the "Yorkton" to keep out of the way in accordance with the precept of Rule 30. Having heard, as alleged, the fog [fol. 57] signals ten times or more, a more or less accurate and guiding bearing could have been obtained.

With respect to the "Mantadoc" whilst her speed would be considered moderate when away from the vicinity of ships, in this instance upon hearing a two blast signal one point on her bow which was significant and should have been significant to any ordinary mind, his duty was to sound a danger signal, stop his engines and reverse, bringing his ship if possible to a standstill or to bare steerageway. I recognize the fact that according to Rule 34, she would be expected to keep her course and speed, and evidently it was

the intention when the two blast signal of the "Yorkton" was answered by a continuation of a three blast but when a second two blast from the "Yorkton" was heard, which was accepted; owing to special circumstances, Rules 37 and 38, a departure from these rules was imperative, it was evidently attempted by an order to starboard a point. Why one Point? A hard-to-starboard, a danger signal and a full speed astern should have been the order. There were heard three signals of two blasts, it is evident the starboarding was done at the last signal, and I have in mind that it was done and begun when the "Yorkton" appeared in sight—the hard-to-starboard and full speed ahead at that moment. Under the circumstances, it was performed in the agony of collision and was, in view of the situation, a proper one; it [fol. 58] had the effect of minimizing the injuries by striking obliquely. How the port bow plates were affected in the impact could not be explained and it remains a mystery to the Court. In this instance also there seems to have been a remissness to obtain by the means available a proper bearing of the sounds heard. I am of opinion that the "Mantadoc" did not meet the requirements of Rules 19 and 22, second paragraph of Rule 23.

The last paragraph of Rule 30 can be included as an obligation which has not been met, for this reason; it is averred that the "Yorkton" was one point on the port bow; her signal of two blasts indicating she was crossing "Mantadoc's" bow was contrary to regulations. Objections should have been conveyed to the "Yorkton" by means of the danger signal, and an immediate order of reversing engines simultaneously given. Rules 19, 22, 23, 30, 37 and 38, were violated.

Further, I consider that one point deviation on any course which has been found to exist, should have induced an adjustment of compasses, whereby a deviation curve would have indicated the variation of errors on each and every point. I have in mind that the courses given were not exactly steered or the errors found not applied. Having no proofs in that respect, I refrain from studying the courses and the place of the collision which, however, is immaterial, as the essential factors which led to this casualty is a viola- [fol. 59] tion of certain Rules of the Road for the Great Lakes by each ship.

The above being determined, it necessitates the rendering of the following Judgment:

Judgment

The Court, having carefully weighed and reviewed the evidence adduced, for the reasons given in the analysis which criticizes both ships, finds, Captain F. M. Burmister of the S. S. "Yorkton" in default and his Certificate No. 11689 is suspended for the balance of the year 1930; also finds Captain C. B. Kirk of the "Mantadoc" in default to the same degree and his Certificate No. 8001 is suspended till December 31st, 1930.

As the evidence does not demonstrate any wilful neglect, obstinacy or indifference, but a wrong interpretation of the meaning of the Rules of the Road, and their application due to lack of experience, being viewed by the Court as a culpable error of judgment, for those reasons, it is recommended that Mate's Certificate be issued to each Master during the interim of suspension.

Read in open Court at Ottawa this 5th day of August, 1930.

(Sgd.) L. A. Demers, Dominion Wreck Comm.

Concurred in by
(Sgd.) J. B. Foote, (Sgd.) J. H. Solery, Nautical Assessors.

[fol. 60] At the conclusion of the hearing of evidence the following questions were read and submitted for and on behalf of the Department of Marine, for the opinion of the Court.

1. What were the weather conditions prevailing at the time of and previous to the collision?

2. Was a good and proper look-out maintained on board of each vessel?

3. Did each vessel comply with the provisions of the Rules of the Road for the Great Lakes?

4. What was the cause of the collision?

5. Was the collision caused through the wrongful act or default of the Master, Officer of the Watch, or any member

of the crew of the S. S. "Yorkton" or of the Master, Officer of the Watch or any member of the crew of the S. S. "Mantadoc," or anyone or more of them, and if so, which of them?

Answers to Questions by the Court

1. Foggy.
2. Good look-out.
3. No.
4. See Report and Judgment.
5. Default of Master of each vessel.

——, Dominion Wreck Commissioner.

[fol. 61] In United States District Court

Libel of British Empire Grain Company, Limited

To the Honorable the District Judges of the United States for the Western District of New York:

The libel of British Empire Grain Company, Limited, in a cause of collision and damage, civil and maritime, against Paterson Steamships Limited, respectfully shows and alleges as follows:

First. That libellant is and at all times herein mentioned was a corporation duly organized and existing under and by virtue of the Laws of the Dominion of Canada.

Second. That Paterson Steamships Limited is and at all times hereinafter mentioned was a corporation organized and existing under and by virtue of the Laws of the Dominion of Canada, and is and at all times hereinafter mentioned was the owner and operator of the Steamer "Mantadoc."

Third. That heretofore and on or about the 9th day of July, 1930, the libellant shipped on board the Steamer "Yorkton" at Port Arthur, Ontario, 36,400 bushels of oats in good order and condition, to be transported in said

steamer and delivered to the order of libellant at Montreal, Canada, and that libellant was and at all times herein mentioned was the sole owner of said oats.

Fourth. That the said Steamer "Yorkton" sailed from Port Arthur on July 9, 1930 with said shipment of oats on [fol. 62] board, and that while on said voyage and at about 11:22 P. M. when about 3 miles northwest of Whitefish Point on Lake Superior, in American waters, in a dense fog, said Steamer "Yorkton" was struck by the Steamer "Mantadoc" so that the Steamer "Yorkton" commenced to fill with water, and the water flooded her fires and she commenced to sink and after being taken in tow by the Steamer "Mantadoc" she did sink on the beach, a short distance below Whitefish Point on the American shore, and the said shipment of oats became a total loss.

Fifth. That at the time of said collision said Steamer "Yorkton" was running under reduced speed and those on board the Steamer "Yorkton" had made out the fog signals of a steamer that proved to be the "Mantadoc," that said signals bore on the starboard side of the Steamer "Yorkton," and that the steamer "Yorkton" directed her course to port in order to keep out of the way of the steamer whose signals had been heard, but that suddenly the Steamer "Mantadoc" loomed up in the fog a short distance off, coming at a high and unlawful rate of speed, and although those on the Steamer "Yorkton" endeavored to throw her stern away from the oncoming Steamer "Mantadoc," the Steamer "Mantadoc" nevertheless came on and with her stem crashed into the starboard side of the Steamer "Yorkton" a short distance forward of her stern, and opened up the side of the Steamer "Yorkton" so that she commenced to fill and sink.

[fol. 63] Sixth. And not being informed as to all that took place on board said steamers, and reserving the right to urge such other and further faults as may appear upon a full hearing of this cause, that respondent is at fault for said collision in that those in charge of the navigation of the Steamer "Mantadoc" were guilty of faults and negligence, in that they were careless and inattentive to their duties, in that no proper lookout was maintained, in that said steamer was navigated at too great a speed in a fog,

in that she did not give proper heed to the signals of the Steamer "Yorkton," in that she did not stop and reverse her engines in time as should have been done, all in violation of the law and pilot rules.

Seventh. That said collision was not the result of any fault on the part of libellant; that by reason of the premises, libellant has sustained damage in the sum of Twenty Thousand Dollars ($20,000.00).

Eighth. That respondent has goods and chattels within this district, to-wit: the Steamer "Lachinedoc."

Ninth. That all and singular the premises are true and within the Admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore libellant prays that citations in due form of law, according to the course of this Honorable Court in [fol. 64] causes of admiralty and maritime jurisdiction, may issue against Paterson Steamships Limited, and that it by its officers may be compelled to appear and answer upon oath all and singular the matters aforesaid, and if the said corporation cannot be found within this District, that an attachment issue against its goods and chattels, and that this Honorable Court will be pleased to decree the payment of the damages aforesaid, with the costs, and libellant may have such other and further relief as to law and justice may appertain.

Brown, Ely & Richards, 1317 Chamber of Commerce, Buffalo, N. Y., and Bigham, Englar, Jones & Houston, 64 Wall Street, New York, N. Y., Proctors for Libellant.

[fol. 65] *Duly sworn to by Laurence E. Coffey. Jurat omitted in printing.*

[fol. 66] IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

BRITISH EMPIRE GRAIN COMPANY, LIMITED, Libelant,

vs.

PATERSON STEAMSHIPS LIMITED, Respondent.

NOTICE OF APPEARANCE

Sirs: Please take notice that Paterson Steamships Limited, the respondent above named, appears in this action and that we are retained as its proctors.

Dated Buffalo, New York, July 22d, 1930.

Yours, etc., Stanley & Gidley, Proctors for Respondent. Office and Post-office address: 1042 Marine Trust Bldg., Buffalo, N. Y.

To Brown, Ely & Richards and Bigham, Englar, Jones & Houston, Proctors for Libelant.

[fol. 67] IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

In Admiralty

BRITISH EMPIRE GRAIN COMPANY, LIMITED, Libelant,

against

PATERSON STEAMSHIPS LIMITED, Respondent

NOTICE OF MOTION TO DISMISS, ETC.

SIRS: Please take notice that upon the annexed affidavit of Ermin Burton Sutherland, sworn to the 6th day of September, 1930, and the annexed affidavit of William W. Hall, sworn to the 4th day of September, 1930, and the annexed affidavit of Rufus Clement Holden, Jr., sworn to the 4th day of September, 1930, and the annexed affidavit of George D. MacDonald, sworn to the 8th day of September, 1930, and the annexed affidavit of Ellis H. Gidley, sworn to the 8th day of September, 1930, and upon the libel heretofore filed herein and the writ of foreign attachment heretofore issued out of this Court, and the return of the Marshal thereto, and upon respondent's exceptions to said libel,

and upon the suggestion of Paterson Steamships Limited filed herewith, a motion will be made by the undersigned [fol. 68] at a stated session of this Court appointed to be held for the disposition of maritime causes in the United States District Court room in the Federal Building in the City of Buffalo, New York, on the 15th day of September, 1930, (said day being the return day of process issued under the libel filed in the above entitled action) at ten o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order and decree of this Honorable Court granting and decreeing to Paterson Steamships Limited, respondent in the above entitled action, the following relief:

1. That the Court exercise the discretion conferred upon it by operation of law and refuse to take and entertain further jurisdiction of the above entitled action.

2. That the Court dismiss the libel herein and vacate the writ of foreign attachment heretofore granted and served herein at the Port of Buffalo upon the Steamer Lachinedoc, the property of Paterson Steamships Limited, on or about the 21st day of July, 1930.

3. That the Court remit libelant to its remedies in the Courts of the Dominion of Canada.

4. That the Court direct that the bond and stipulation heretofore given and filed herein by Paterson Steamships Limited with American Surety Company of New York, as surety, for the release of the Steamer Lachinedoc from arrest and attachment under the writ of foreign attachment heretofore issued and served herein upon the prayer of [fol. 69] libelant, be cancelled and discharged of record and that the Clerk of this Court so mark said bond and stipulation.

5. That the Court grant a decree to Paterson Steamships Limited for such other and further relief herein as may be incidental thereto or proper in the premises.

Yours, etc., Stanley & Gidley, Proctors for Respondent, Paterson Steamships, Limited.

To May C. Sickmon, Clerk of the Court; Brown, Ely & Richards, and Bigham, Englar, Jones & Houston, Proctors for Libelant.

IN UNITED STATES DISTRICT COURT

LIBEL OF HENRY K. STARNES

To the Honorable, the District Judges of the United States for the Western District of New York:

The libel of Henry K. Starnes, doing business as H. K. Starnes & Company, in a cause of collision and damage, civil and maritime, against Paterson Steamships Limited, respectfully shows and alleges as follows:

[fol. 70] First. That libellant resides in the City of Montreal, Canada, and is there engaged in business as H. K. Starnes & Company.

Second. That Paterson Steamships Limited is and at all times hereinafter mentioned was a corporation organized and existing under and by virtue of the Laws of the Dominion of Canada, and is and at all times hereinafter mentioned was the owner and operator of the Steamer "Mantadoc."

Third. That heretofore and on or about the 9th day of July, 1930, the libellant shipped on board the Steamer "Yorkton" at Port Arthur, Ontario, 15,000 bushels of Oats in good order and condition, to be transported in said steamer, and that libellant was and at all times herein mentioned was the sole owner of said Oats.

Fourth. That the said Steamer "Yorkton" sailed from Port Arthur on July 9, 1930 with said shipment of Oats on board, and that while on said voyage and at about 11:22 P. M. when about 3 miles northwest of Whitefish Point on Lake Superior, in American waters, in a dense fog said Steamer "Yorkton" was struck by the Steamer "Mantadoc" so that the Steamer "Yorkton" commenced to fill with water, and the water flooded her fires and she commenced to sink and after being taken in tow by the Steamer "Mantadoc" she did sink on the beach, a short distance below Whitefish Point on the American shore, and the said shipment of Oats became a total loss.

Fifth. That at the time of said collision said Steamer "Yorkton" was running under reduced speed and those

[fol. 71] on board the Steamer "Yorkton" had made out the fog signals of a steamer that proved to be the "Mantadoc", that said signals bore on the starboard side of the Steamer "Yorkton", and that the Steamer "Yorkton" directed her course to port in order to keep out of the way of the steamer whose signals had been heard, but that suddenly the Steamer "Mantadoc" loomed up in the fog a short distance off, coming at a high and unlawful rate of speed, and although those on the Steamer "Yorkton" endeavored to throw her stern away from the oncoming Steamer "Mantadoc", the Steamer "Mantadoc" nevertheless came on and with her stem crashed into the starboard side of the Steamer "Yorkton" a short distance forward of her stern, and opened up the side of the Steamer "Yorkton" so that she commenced to fill and sink.

Sixth. And not being informed as to all that took place on board said steamers, and reserving the right to urge such other and further faults as may appear upon a full hearing of this cause, that respondent is at fault for said collision in that those in charge of the navigation of the Steamer "Mantadoc" were guilty of faults and negligence, in that they were careless and inattentive to their duties, in that no proper lookout was maintained, in that said steamer was navigated at too great a speed in a fog, in that she did not give proper heed to the signals of the Steamer "Yorkton", in that she did not stop and reverse her engines in time as should have been done, all in violation of the law and pilot rules.

[fol. 72] Seventh. That said collision was not the result of any fault on the part of libellant; that by reason of the premises, libellant has sustained damage in the sum of Seven Thousand Five Hundred Dollars ($7,500.00).

Eighth. That respondent has goods and chattels within this district, to-wit: the Steamer "Lachinedoc."

Ninth. That all and singular the premises are true and within the admirality and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, libellant prays that citations in due form of law, according to the course of this Honorable Court in

causes of admiralty and maritime jurisdiction, may issue against Paterson Steamships Limited, and that it by its officers may be compelled to appear and answer upon oath all and singular the matters aforesaid, and if the said corporation cannot be found within this District, that an attachment issue against its goods and chattels, and that this Honorable Court will be pleased to decree the payment of the damages aforesaid, with the costs, and libellant may have such other and further relief as to law and justice may appertain.

Brown, Ely & Richards, 1317 Chamber of Commerce, Buffalo, N. Y., and Bigham, Englar, Jones & Houston, 64 Wall Street, New York, N. Y., Proctors for Libellant.

[fol. 73] *Duly sworn to by Laurence E. Coffey. Jurat omitted in printing.*

[fol. 74] IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

HENRY K. STARNES, Doing Business as "H. K. Starnes & Co.," Libelant,

vs.

PATERSON STEAMSHIPS, LIMITED, Respondent

NOTICE OF APPEARANCE

SIRS: Please take notice that Paterson Steamships Limited, the respondent above named, appears in this action and that we are retained as its proctors.

Dated Buffalo, New York, July 22nd, 1930.

Yours, etc., Stanley & Gidley, Proctors for Respondent. Office and Post-Office address: 1042 Marine Trust Building, Buffalo, N. Y.

To Brown, Ely & Richards and Bigham, Englar, Jones & Houston, Proctors for Libelant.

[fol. 75] IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

In Admirality

HENRY K. STARNES, Doing Business as "H. K. Starnes & Co.," Libelant,

against

PATERSON STEAMSHIPS, LIMITED, Respondent

NOTICE OF MOTION TO DISMISS, ETC.

SIRS: Please take notice that upon the annexed affidavit of Ermin Burton Sutherland, sworn to the 6th day of September, 1930, and the annexed affidavit of William W. Hall, sworn to the 4th day of September, 1930, and the annexed affidavit of Rufus Clement Holden, Jr., sworn to the 4th day of September, 1930, and the annexed affidavit of George D. MacDonald, sworn to the 8th day of September, 1930, and the annexed affidavit of Ellis H. Gidley, sworn to the 8th day of September, 1930, and the libel heretofore filed herein, and upon respondent's exceptions to said libel, and upon the suggestion of Paterson Steamships Limited filed herewith, a motion will be made by the undersigned, at a stated session of this Court appointed to be held for the disposition of maritime causes in the United States District Court room in the Federal Building, in the City of [fol. 76] Buffalo, New York, on the 15th day of September, 1930 (said day being the return day of process issued under the libel filed in the above entitled action) at ten o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order and decree of this Honorable Court granting and decreeing to Paterson Steamships Limited, respondent in the above entitled action, the following relief:

1. That the Court exercise the discretion conferred upon it by operation of law and refuse to take and entertain further jurisdiction of the above entitled action.

2. That the Court dismiss the libel herein.

3. That the Court remit libelant to its remedies in the Courts of the Dominion of Canada.

4. That the Court direct that the bond and stipulation heretofore given and filed herein by Paterson Steamships Limited with American Surety Company of New York, as surety, be cancelled and discharged of record and that the Clerk of this Court so mark said bond and stipulation.

5. That the Court grant a decree to Paterson Steamships Limited for such other and further relief herein as may be incidental thereto or proper in the premises.

Yours, etc., Stanley & Gidley, Proctors for Respondent Paterson Steamships, Limited.

[fol. 77] To May C. Sickmon, Clerk of the Court; Brown, Ely & Richards, and Bigham, Englar, Jones & Houston, Proctors for Libelant.

In United States District Court, Western District of New York

In Admiralty

Henry K. Starnes, Doing Business as "H. K. Starnes & Co.," Libelant,

against

Paterson Steamships, Limited, Respondent

Suggestion

To the Honorable the Judges of the United States District Court for the Western District of New York:

Paterson Steamships Limited, a corporation of the Dominion of Canada, named as respondent herein, respect-[fol. 78] fully suggests to this Honorable Court that this Honorable Court ought not entertain or exercise further jurisdiction over the above entitled action, for the reason that it appears upon the face of the libel herein and from the moving papers attached hereto, that the matters and things complained of by libelant which is a citizen and subject of the Dominion of Canada, against respondent, which is also a citizen and subject of the Dominion of Canada, arose out of a collision between a vessel of Canadian reg-

istry with another vessel of Canadian registry, while carrying cargo owned by a Canadian citizen and being transported from one Canadian port to another Canadian port, all of which matters and things are properly the subjects of Canada, in accordance with the statutes and rules of law of the Dominion of Canada in such case made and provided.

Wherefore Paterson Steamships Limited prays that this Honorable Court will refuse to entertain or exercise further jurisdiction herein; that the libel herein be dismissed, and the bond heretofore given herein be cancelled of record; and that libelant be remitted to the Courts of the Dominion of Canada for the exercise of the remedies there afforded it.

Paterson Steamships Limited, by E. B. Sutherland, Secretary.

[fol. 79] *Duly sworn to by E. B. Sutherland. Jurat omitted in printing.*

[fol. 80] IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

In Admiralty

HENRY K. STARNES, Doing Business as "H. K. Starnes & Co.," Libelant,

against

PATERSON STEAMSHIPS, LIMITED, Respondent

EXCEPTIONS TO LIBEL

To the Honorable the Judges of the United States District Court for the Western District of New York:

The exceptions of Paterson Steamships Limited, respondent in the above entitled action, to the libel of Henry K. Starnes, doing business as H. K. Starnes & Co., alleges:

I. That upon the facts alleged in the libel herein this Honorable Court ought not to entertain or exercise further jurisdiction over the pending action.

II. That the matters and things set forth in the libel herein constitute a matter of liability or of obligation admeasured and determinable according to the laws and statutes of the Dominion of Canada and cognizable by the Courts of the Dominion of Canada.

[fol. 81] III. That upon the matters and things set forth in the libel herein, libelant ought to be remitted to the Courts of the Dominion of Canada.

Dated Buffalo, New York, September 2nd, 1930.

Stanley & Gidley, Proctors for Respondent, Paterson Steamships, Limited.

In United States District Court, Western District of New York

In Admiralty

Henry K. Starnes, Doing Business as "H. K. Starnes & Co.," Libelant,

against

Paterson Steamships, Limited, Respondent

Affidavit of Ermin Burton Sutherland

Dominion of Canada,
Province of Ontario, ss:

Ermin Burton Sutherland, being duly sworn, deposes and says that he is a resident of Fort William, Ontario, and is [fol. 82] the Secretary of Paterson Steamships Limited, respondent in the above entitled action.

That Paterson Steamships Limited is a corporation organized and existing under and by virtue of the laws of the Dominion of Canada, having its principal office at Fort William, Ontario. That Paterson Steamships Limited is engaged in the business of water transportation upon the Great Lakes, St. Lawrence River and their connecting waters, and that said Paterson Steamships Limited, is the owner and operator of some thirty lake and Welland Canal freight carrying vessels; that among the vessels owned and operated by Paterson Steamships Limited is the Steamer

Mantadoc, a vessel of the Dominion of Canada, registered at the Port of Fort William, and bearing Canadian registry No. 116580.

That it is alleged in the libel herein that libelant resides in the City of Montreal, Quebec, and is there engaged in business as H. K. Starnes & Co.

That it is alleged in the libel herein that libelant was the owner of a portion of the cargo of grain laden and being transported on board the Steamer Yorkton on a voyage from Port Arthur to Montreal on or about the 9th day of July, 1930; that it is also alleged in said libel that the Steamer Yorkton and the Steamer Mantadoc were in collision on Lake Superior off Whitefish Point on the evening of the 9th day of July, 1930, and that as a result of said [fol. 83] collision the Steamer Yorkton was later beached in a sinking condition, resulting in an alleged total loss of libelant's portion of her cargo, for which loss recovery is sought in this action for the sum of $7,500.00.

That the Steamer Yorkton is also a Canadian freight carrying vessel, being registered at the Port of Toronto, Ontario, and bearing Canadian Registry No. 132060. That the Steamer Yorkton was at the time of said collision and is owned and operated by the Mathews Steamship Company, Limited, a corporation organized and existing under and by virtue of the laws of the Dominion of Canada, or the laws of the Province of Ontario, and having its principal office in the City of Toronto, Ontario, and engaged in the business of water transportation upon the Great Lakes, St. Lawrence River and their connecting waters.

That it is alleged in the libel herein that that portion of the cargo owned by libelant, which was being carried and transported upon the Steamer Yorkton at the time of said collision was shipped on board said vessel at Port Arthur, Ontario, on or about the 9th day of July, 1930, for carriage and transportation to and delivery at Montreal, Quebec. That at the time of the shipment and loading of libelant's said grain on board the Steamer Yorkton a bill of lading was issued therefor on behalf of said vessel at Fort William, Ontario, which said bill of lading acknowledged the shipment of said grain on board said Steamer Yorkton for [fol. 84] carriage and transportation to and delivery at Montreal; that the contract for the carriage of said cargo was and is subject to, and governed by the laws of the

Dominion of Canada, where the said contract was made and where it was to be performed.

That the licensed officers in charge of both the Steamers Mantadoc and Yorkton were citizens and residents of the Dominion of Canada; that most, if not all, of the members of the crews of both vessels were likewise citizens and residents of the Dominion of Canada.

That this action was begun by the filing of a libel in this Honorable Court on or about the 22nd day of July, 1930; that the Steamer Lachinedoc, a vessel of Canadian registry, owned and operated by Paterson Steamships Limited, had been attached by the Marshal of this Court at the Port of Buffalo on the previous day upon two writs of foreign attachment, issued upon the prayer of Canada Malting Company, Ltd., and British-Empire Grain Company Limited respectively, libelants, in actions pending in this Court against Paterson Steamships Limited. That as deponent is informed by Messrs. Stanley & Gidley, local counsel for Paterson Steamships Limited, and verily believes, it was agreed that bond should be filed in this pending action in lieu of attachment therein of the Steamer Lachinedoc, and that such bond was filed at the same time bonds were filed to release said vessel from the writs of foreign attachment [fol. 85] granted in said other actions, as is more fully set forth in deponent's affidavit made a part of the moving papers in said other actions.

That no instructions were given by Paterson Steamships Limited that a general appearance be entered herein in its behalf, and Paterson Steamships Limited in filing said bonds to procure release of the Steamer Lachinedoc did not intend thereby to waive any of its rights with respect to contesting the question of the exercise of jurisdiction by this Honorable Court over the questions of fault and damage arising out of said collision between the Steamer Yorktown and the Steamer Mantadoc; that if a general appearance was entered herein it was so entered without the knowledge or authority of said Paterson Steamships Limited. That following said collision an investigation as required by law was duly held and conducted by the Wreck Commissioner of the Dominion of Canada, and that as a result thereof said Wreck Commissioner has determined and found the masters of both the Steamer Mantadoc and

the Steamer Yorkton guilty of fault, resulting in said collision, and has suspended the respective licenses of said masters for the balance of the season of navigation of 1930.

That Paterson Steamships Limited have retained Messrs. Meredith, Holden, Heward & Holden, barristers and solicitors of Montreal, as its legal representatives, concerning the [fol. 86] various questions arising out of said collision; that, as deponent is advised by Messrs. Meredith, Holden, Heward & Holden, and verily believes, if jurisdiction of the above entitled action be retained by this Court that under all the circumstances of this case this Honorable Court will be unable to do evenhanded justice between the parties in accordance with the Canadian Law, to which all of the parties and vessels involved are subject.

That an action by Paterson Steamships Limited against the owners of the Steamer Yorkton, Mathews Steamship Company, Limited, in respect of the damage occasioned by the said collision has been instituted, and is now pending in the Toronto Admiralty District of the Exchequer Court of Canada, and in that action the said Court will be called upon to determine the question of liability as between the said ships and their owners, and unless this Honorable Court will refuse to entertain or exercise jurisdiction a multiplicity of actions will result.

That if this Honorable Court will refuse to exercise jurisdiction and will dismiss the libel herein and will vacate the writ of foreign attachment and cancel the bond heretofore given herein, Paterson Steamships Limited is prepared to furnish and will furnish a valid bond for a like amount in any action in rem which the present libelant may institute in any Admiralty District of the Exchequer Court of Canada, as security for whatever claim in damages the Libelant may have.

[fol. 87] That the Steamer Yorkton, though now raised, has not yet been repaired, and that in deponent's opinion in her present unrepaired condition said vessel is of little or no value as she now lies at Fort William, Ontario.

Wherefore deponent prays that an order and decree of this Court be made refusing to take and entertain jurisdiction of the pending action, dismissing the libel and vacating the writ of foreign attachment heretofore served, cancelling the bond given for the release of the Steamer Lachinedoc, remitting the libelant to its remedies in the

Courts of the Dominion of Canada, and for such other and further relief as may be just and proper in the premises.

E. B. Sutherland.

Subscribed and sworn to before me this 6th day of September, 1930. F. R. Morris, Notary Public. Life Commission. (Notarial Seal.)

[fol. 88] IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

In Admiralty

HENRY K. STARNES, Doing Business as "H. K. Starnes & Co.," Libelant,

against

PATERSON STEAMSHIPS, LIMITED, Respondent

AFFIDAVIT OF WILLIAM WALTER HALL

DOMINION OF CANADA,
Province of Ontario, ss:

William Walter Hall, being duly sworn, deposes and says that he is a resident of Winnipeg, Manitoba, and is General Manager of Paterson Steamships Limited, respondent in the above entitled action.

That Paterson Steamships Limited is a corporation organized and existing under and by virtue of the laws of the Dominion of Canada, having its principal office at Fort William, Ontario. That Paterson Steamships Limited is engaged in the business of water transportation upon the Great Lakes, St. Lawrence River and their connecting waters, and that said Paterson Steamships Limited is the owner and operator of some thirty lake and Welland Canal [fol. 89] freight carrying vessels; that among the vessels owned and operated by Paterson Steamships Limited is the Steamer Mantadoc, a vessel of the Dominion of Canada, registered at the Port of Fort William, and bearing Canadian Registry No. 116580.

That it is alleged in the libel herein that libelant resides in the City of Montreal, Quebec, and is there engaged in business as H. K. Starnes & Co.

That it is alleged in the libel herein that libelant was the owner of a portion of the cargo of grain laden and being

transported on board the Steamer Yorkton on a voyage from Port Arthur to Montreal on or about the 9th day of July, 1930; that it is also alleged in said libel that the Steamer Yorkton and the Steamer Mantadoc were in collision on Lake Superior off Whitefish Point on the evening of the 9th day of July, 1930, and that as a result of said collision the Steamer Yorkton was later beached in a sinking condition, resulting in an alleged total loss of libelant's portion of her cargo, for which loss recovery is sought in this action for the sum of $7,500.00.

That the Steamer Yorkton is also a Canadian freight carrying vessel, being registered at the Port of Toronto, Ontario, and bearing Canadian Registry No. 132060. That the Steamer Yorkton was at the time of said collision and [fol. 90] is owned and operated by the Mathews Steamship Company, Limited, a corporation organized and existing under and by virtue of the laws of the Dominion of Canada, or the laws of the Province of Ontario, and having its principal office in the City of Toronto, Ontario, and engaged in the business of water transportation upon the Great Lakes, St. Lawrence river and their connecting waters.

That it is alleged in the libel herein that that portion of the cargo owned by libelant, which was being carried and transported upon the Steamer Yorkton at the time of said collision was shipped on board said vessel at Port Arthur, Ontario, on or about the 9th day of July, 1930, for carriage and transportation to and delivery at Montreal, Quebec. That at the time of the shipment and loading of libelant's said grain on board the Steamer Yorkton a bill of lading was issued therefor on behalf of said vessel at Fort William, Ontario, which said bill of lading acknowledged the shipment of said grain on board said Steamer Yorkton for carriage and transportation to and delivery at Montreal; that the contract for the carriage of said cargo was and is subject to and governed by the laws of the Dominion of Canada, where the said contract was made and where it was to be performed.

That the licensed officers in charge of both the Steamers Mantadoc and Yorkton were citizens and residents of the [fol. 91] Dominion of Canada; that most, if not all, of the members of the crews of both vessels were likewise citizens and residents of the Dominion of Canada.

That this action was begun by the filing of a libel in this Honorable Court on or about the 22nd day of July, 1930; that the Steamer Lachinedoc, a vessel of Canadian registry, owned and operated by Patterson Steamships Limited, had been attached by the Marshal of this Court at the Port of Buffalo on the previous day upon two writs of foreign attachment, issued upon the prayer of Canada Malting Company, Ltd., and British Empire Grain Company Limited respectively, libelants, in actions pending in this Court against Paterson Steamships Limited. That as deponent is informed by Messrs. Stanley & Gidley, local counsel for Paterson Steamships Limited, and verily believes, it was agreed that bond should be filed in this pending action in lieu of attachment therein of the Steamer Lachinedoc, and that such bond was filed at the same time bonds were filed to release said vessel from the writs of foreign attachment granted in said other actions, as is more fully set forth in deponent's affidavit made a part of the moving papers in said other actions.

That no instructions were given by Paterson Steamships Limited that a general appearance be entered herein in its behalf, and Paterson Steamships Limited in filing said bonds to procure release of the Steamer Lachinedoc did not [fol. 92] intend thereby to waive any of its rights with respect to contesting the questions of the exercise of jurisdiction by this Honorable Court over the questions of fault and damage arising out of said collision between the Steamer Yorkton and the Steamer Mantadoc; that if a general appearance was entered herein it was so entered without the knowledge or authority of said Paterson Steamships Limited. That following said collision an investigation as required by law was duly held and conducted by the Wreck Commissioner of the Dominion of Canada, and that as a result thereof said Wreck Commissioner has determined and found the masters of both the Steamer Mantadoc and the Steamer Yorkton guilty of fault, resulting in said collision, and has suspended the respective licenses of said masters for the balance of the season of navigation of 1930.

That Paterson Steamships Limited has retained Messrs. Meredith, Holden, Heward & Holden, barristers and solicitors of Montreal, as its legal representatives, concerning the various questions arising out of said collision; that as

deponent is advised by Messrs. Meredith, Holden, Heward & Holden, and verily believes, if jurisdiction of the above entitled action be retained by this Court that under all the circumstances of this case this Honorable Court will be unable to do evenhanded justice between the parties in accordance with the Canadian Law, to which all of the parties and vessels involved are subject.

[fol. 93] That an action by Paterson Steamships Limited against the owners of the Steamer Yorkton, Mathews Steamship Company, Limited, in respect of the damage occasioned by the said collision has been instituted, and is now pending in the Toronto Admiralty District of the Exchequer Court of Canada, and in that action the said Court will be called upon to determine the question of liability as between the said ships and their owners, and unless this Honorable Court will refuse to entertain or exercise jurisdiction a multiplicity of actions will result.

That if this Honorable Court will refuse to exercise jurisdiction and will dismiss the libel herein and will vacate the writ of foreign attachment and cancel the bond heretofore given herein, Paterson Steamships Limited is prepared to furnish and will furnish a valid bond for a like amount in any action in rem which the present libelant may institute in any Admiralty District of the Exchequer Court of Canada, as security for whatever claim in damages the libelant may have.

Wherefore deponent prays that an order and decree of this Court be made refusing to take and entertain jurisdiction of the pending action, dismissing the libel and vacating the writ of foreign attachment heretofore served, cancelling the bond given for the release of the Steamer Lachinedoc, remitting the libelant to its remedies in the [fol. 94] Courts of the Dominion of Canada, and for such other and further relief as may be just and proper in the premises.

W. W. Hall.

Subscribed and sworn to before me this 4th day of September, 1930. Ivanhoe Bissonnette, Notary. (Notarial Seal.)

IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

In Admiralty

HENRY K. STARNES, Doing Business as "H. K. Starnes & Co.," Libelant;

against

PATERSON STEAMSHIPS, LIMITED, Respondent

AFFIDAVIT OF RUFUS CLEMENT HOLDEN, JR.

DOMINION OF CANADA,
Province of Quebec, ss:

Rufus Clement Holden, Jr., being duly sworn, deposes and says that he is a resident of the City of Montreal, Quebec, and that he is a member of the firm of Meredith, [fol. 95] Holden, Heward & Holden, barristers and solicitors, engaged in the general practice of law in the City of Montreal, Quebec, with offices at 215 St. James street, West.

That deponent's said firm has been retained by Paterson Steamship Limited as its local representatives for the handling and disposition of the various questions resulting from the collision between the Steamer Yorkton and the Steamer Mantadoc on Lake Superior on July 9th, 1930. That deponent has had charge of the subject matter and of the various questions relating to said collision and is familiar therewith, and makes this affidavit accordingly.

That this action was brought in the United States District Court for the Western District of New York by the filing of a libel by Henry K. Starnes, doing business as H. K. Starnes & Co., who is alleged to be a resident of the City of Montreal, Canada, and there doing business as H. K. Starnes & Co., that it is alleged in the libel that libelant was the owner of a portion of the cargo of grain being carried on and transported by the Steamer Yorkton at the time of said collision. That it is alleged that said Steamer Yorkton was engaged in the transportation of said cargo of grain, was in collision with the Steamer Mantadoc upon the waters of Lake Superior off Whitefish Point on the evening of July 9, 1930, and that as a result thereof the Steamer Yorkton gradually sunk and was beached in a sinking condition resulting in the alleged total

[fol. 96] loss of libelant's portion of the cargo, for which recovery is sought in this action for the sum of $7,500.00.

That it is alleged therein that the Steamer Mantadoc, which is owned and operated by Paterson Steamships Limited, a corporation of the Dominion of Canada, was at fault for said collision and the resultant damage; that it is further alleged that the portion of said cargo of grain owned by libelant was laden on board the Steamer Yorkton at the Port of Port Arthur, Ontario, for carriage and transportation to and delivery at the Port of Montreal, Quebec.

That as appears by the affidavit of Ermin Burton Sutherland, sworn to the 6th day of September, 1930, and the affidavit of William W. Hall, sworn to the 4th day of September, 1930, annexed hereto and made a part of these motion papers, the Steamer Yorkton is a vessel of Canadian registry, owned and operated by Mathews Steamship Company, Ltd., a Canadian corporation, and the Steamer Mantadoc is likewise a vessel of Canadian registry; that as also appears by said affidavits a bill of lading was issued for the carriage of said libelant's portion of said cargo of grain at Fort William, Ontario; that the contract for the carriage of said cargo was and is subject to, and governed by the laws of the Dominion of Canada, where the said contract was made and where it was to be performed.

That as also appears by said affidavits the licensed officers in charge of both the Steamers Mantadoc and York-[fol. 97] ton were citizens and residents of the Dominion of Canada, and that most, if not all, of the members of the crews of both vessels were likewise citizens and residents of the Dominion of Canada.

That as further appears by said affidavits following said collision an investigation as required by law was duly held by the Wreck Commissioner of the Dominion of Canada, and that as a result thereof said Wreck Commissioner determined and found the masters of both the Steamer Mantadoc and the Steamer Yorkton guilty of fault resulting in the collision, and suspended the respective licenses of said masters for the balance of the season of navigation of 1930.

That as deponent is advised by Messrs. Stanley & Gidley, local counsel for Paterson Steamships Limited in Buffalo, and verily believes, this action was begun by the filing of a

libel in personam on or about the 22nd day of July, 1930; the Steamer Lachinedoc having on the previous day been attached by the Marshal of this Court at the Port of Buffalo upon two writs of foreign attachment issued out of this Court upon the libels of Canada Malting Company, Ltd., and British Empire Grain Company Limited, respectively.

That in an action of this nature pending in the Courts of the Dominion of Canada, the rule of law is that a cargo owner, in case of mutual fault on the part of both vessels can only recover a moiety of his loss from the vessel colliding with the vessel upon which his cargo is being transported. That accordingly if this action was pending in [fol. 98] the Courts of the Dominion of Can[illegible] and both ships were found in fault libelant would be able in no event to recover more than one-half of its damage as against the Steamer Mantadoc, and her owners, Paterson Steamships Limited.

That under Canadian Law the Steamer Yorkton and her owners could limit their liability only to an aggregate amount equivalent to $38.02, for each ton of the said Steamer Yorkton's registered tonnage with the addition of any engine-room space deducted for the purpose of ascertaining that tonnage.

That an action by the owners of the said Steamship Mantadoc, Paterson Steamships Limited, against the owners of the said Steamer Yorkton, Mathews Steamship Company, Limited, for the damages occasioned by the collision in question has been instituted and is pending in the Toronto Admiralty District of the Exchequer Court of Canada, and in that action the said Court will be called upon to determine the question of liability as between the said ships and their owners.

R. Clement Holden, Jr.

Subscribed and sworn to before me at Montreal, Province of Quebec, Canada, this 4th day of September, 1930. Ivanhoe Bissonnette, Notary. (Notarial Seal.)

[fol. 99] IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

In Admiralty

HENRY K. STARNES, Doing Business as "H. K. Starnes & Co.," Libelant,

against

PATERSON STEAMSHIPS, LIMITED, Respondent

AFFIDAVIT OF GEORGE D. MACDONALD

STATE OF NEW YORK,
County of Erie, ss:

George D. MacDonald, being duly sworn, deposes and says that he is a resident of the City of Buffalo, New York; that he is engaged in the business of water transportation, and that he is local vessel agent for Paterson Steamships Limited at the Port of Buffalo, and was such on the 21st day of July, 1930.

That my duties as such vessel agent generally consist of seeing that vessels of that fleet coming into that Port receive proper dispatch in loading and unloading cargoes in the Port of Buffalo, and also in transmitting orders from the owners to the masters of said ships.

That on the 21st day of July, 1930, sometime after four o'clock in the afternoon, I was advised that the Steamer [fol. 100] Lachinedoc, then lying at the Dakota Elevator loading cargo, had been attached by the United States Marshal for the Western District of New York under process issued out of this Honorable Court. I at once got in touch with Messrs. Stanley & Gidley, attorneys, with offices in the Marine Trust Building, Buffalo, and advised them of such attachment, and informed them that it was desired to procure the release of said vessel from attachment at once, so that she would not be delayed in starting upon her then pending voyage. Mr. Otten of their office advised me that it was then too late in the day to procure any bond or to release the vessel, but that they would proceed promptly to obtain and file bond on the following morning. That in the evening I talked by telephone to William W. Hall, General Manager of Paterson Steamships Limited, who was then at Toronto, and advised him of the seizure

of the Steamer Lachinedoc, and that I had taken the matter up with Messrs. Stanley & Gidley, with a view of procuring her release, and he instructed me to have Messrs. Stanley & Gidley obtain and file bond for the release of the Steamer Lachinedoc. Accordingly on the following morning I telegraphed Paterson Steamships Limited at Fort William, Ontario, that I had so advised Mr. Hall at Toronto, and that I was arranging bond so as to release the vessel promptly.

The bond was obtained about two o'clock on the 22nd day of July, 1930, and the Steamer Lachinedoc was released, and thereupon left the port on the afternoon of that day.

[fol. 101] I neither received nor gave any instructions other than as related above, and I had no authority as local vessel agent to do more than to facilitate the movement of the Steamer Lachinedoc when attached under the process of this Honorable Court.

George D. MacDonald.

Subscribed and sworn to before me this 8th day of September, 1930. Arthur E. Otten, Notary Public in and for Erie County, New York.

IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

In Admiralty

HENRY K. STARNES, Doing Business as H. K. Starnes & Co., Libelant,

against

PATERSON STEAMSHIPS, LIMITED, Respondent

AFFIDAVIT OF ELLIS H. GIDLEY

STATE OF NEW YORK,
County of Erie, ss:

Ellis H. Gidley, being duly sworn, deposes, and says that he is a resident of the City of Buffalo, New York, and [fol. 102] is an attorney at law and a member of the firm of

Stanley & Gidley, attorneys, with offices at 1042 Marine Trust Building, Buffalo, New York.

That on or about the 21st day of July, 1930, deponent's said firm was directed by Mr. George D. MacDonald to procure the release of the Steamer Lachinedoc from attachment at the Port of Buffalo upon a writ of foreign attachment issued in an action pending in this Court upon the libel of Canada Malting Company, Ltd., and also upon a further writ pending in this Court upon the libel of British Empire Grain Company Limited, and that deponent has had the subject matter in charge and is familiar therewith, and makes this affidavit accordingly.

That following Mr. MacDonald's instructions deponent's said firm telegraphed Paterson Steamships Limited at Fort William, on the morning of July 22nd, 1930, that they had been so instructed, and that bonds were required in a total sum of $60,000.00, to release the Steamer Lachinedoc, and asked that said bonds be arranged through the Canadian Surety Company's representative at Winnipeg. That meanwhile deponent obtained copies of the libel from Messrs. Brown, Ely & Richards, proctors for libelant, and learned that two libels had been filed in this Court, one filed by Canada Malting Company, Ltd., seeking recovery of damage in the sum of $40,000.00, and one filed by British Empire [fol. 103] Grain Company Limited, seeking recovery of damage in the sum of $20,000.00. That thereafter, and about noon of said day, deponent was informed by Messrs. Brown, Ely & Richards that they were filing a third libel for a similar cause of action in favor of Henry K. Starnes, doing business as H. K. Starnes & Company, seeking recovery of the sum of $7,500.00, and that they were desirous of amending the libel filed by British Empire Grain Company so as to seek to recover only $12,500.00 herein.

That about the same time deponent was notified by the Buffalo Manager of the American Surety Company of New York that he had received authority to execute said bonds, and thereupon deponent drafted three separate bonds, one in favor of Canada Malting Company, Ltd., in the sum of $40,000.00, one in favor of British Empire Grain Company Limited for the sum of $12,500.00, and one in favor of Henry K. Starnes, doing business as H. K. Starnes & Co., in the sum of $7,500.00, and procured the execution of the same, and after securing the approval of Messrs. Brown, Ely &

Richards thereto filed the same in this Court together with a notice of appearance in each of said actions. Thereupon the Steamer Lachinedoc was released from attachment and immediately proceeded upon her then pending voyage.

That as appears from the libel herein this action is brought by a resident of the Dominion of Canada, engaged [fol. 104] in business in the City of Montreal, against a corporation of the Dominion of Canada. Recovery is sought herein for the alleged loss of a portion of cargo of grain being carried on the Steamer Yorkton as the result of the sinking of the Steamer Yorkton in the waters of Lake Superior on July 9th, 1930, following a collision between the Steamer Yorkton and the Steamer Mantadoc, owned by the respondent herein.

That the rule of law as applied in the Courts of Admiralty in the United States permits an owner of cargo laden upon one of two vessels involved in a collision to sue either one or both vessels, or the owners thereof, at his election; and, if such cargo owner did not contribute to the disaster, permits his recovery, in either event, of the full amount of his loss notwithstanding that the collision be held to be due to mutual fault. That it results that if this Honorable Court retains jurisdiction of this action and applies the United States rule of damage that Paterson Steamships Limited, if fault be found, would be held liable herein for the full amount of cargo owner's damage, even though it be found that both the Steamer Mantadoc and the Steamer Yorkton were mutually at fault. That if said Paterson Steamships Limited be condemned herein for the full amount of cargo owner's damage, Paterson Steamships Limited probably would not be able to exercise any remedy by way of recoupment against the Steamer Yorkton, and [fol. 105] her owners, for the reason that the Steamer Yorkton, as well as the other vessels owned by Mathews Steamship Company, Ltd., are of Canadian registry, and usually trade between Canadian ports, and that it would be highly improbable that this Honorable Court could secure jurisdiction over the Steamer Yorkton, and her owners, or that said vessel, or her owners, could be effectively brought into this litigation by the exercise of Rule 56 of the Admiralty Rules of the United States. That even if the Steamer Yorkton, or other property of her owners, were found within the jurisdiction of this Honorable Court, and

were effectively brought into this litigation as parties thereto, and a finding of mutual fault thereafter resulted with a decree of divided damage between the Steamer Yorkton and the Steamer Mantadoc, the liability of the Steamer Yorkton, and her owners, for the amount of cargo owner's loss and damage so found could be limited under the statutes of the United States to the value of the res plus the pending freight immediately following the disaster.

That as deponent is informed and believes, following said collision the Steamer Yorkton was abandoned by her owners as a constructive total loss as she lay sunk in the waters of Lake Superior; that said vessel has now been raised and towed to Port Arthur, Ontario, but is seriously damaged, and in her present unrepaired condition is of little or no value; that it follows that the value of said ves-
[fol. 106] sel immediately following the disaster, exclusive of her pending freight, would be little or nothing, and if her value in her salved condition, as now existing at the port of Port Arthur, Ontario, be taken there must be deducted therefrom the expenses of salvage of said vessel and towage from the point of disaster to Port Arthur, Ontario, and that by reason of the application of the limitation of liability statute of the United States to cases of foreign owned vessels the result would be that the Steamer Yorkton and her owners, could escape liability in the United States Court against any recoupment that Paterson Steamships Limited might be entitled to enforce against said vessel and her owners, and that the Steamer Mantadoc, and her owners, would thus be required to pay the full amount of cargo owner's loss and damage, leaving it without an effective remedy in the premises against the Steamer Yorkton, and her owners.

It follows, that Paterson Steamships Limited, if jurisdiction be retained by this Court herein, will not dare to implead the Steamer Yorkton, or her owners, in the pending action, assuming that jurisdiction of said vessel, or her owners, could be secured for the reason that the Steamer Yorkton, and her owners, would thus be enabled to escape the payment of any substantial amount of recoupment decreed against them in favor of Paterson Steamships Limited, as a result of the matters and things set forth in the libel herein, through the exercise of such limitation of liability.

[fol. 107] Accordingly, if jurisdiction be retained herein by this Honorable Court, and Paterson Steamships Limited be condemned in accordance with the rule of damage as applied in the United States Courts said Paterson Steamships Limited will be called upon to pay the full amount of loss and damage sustained by libelant as a result of the matters and things complained of in the libel herein and will be left without an effective remedy against the Steamer Yorkton, and her owners, which may be enforced in the Courts of the United States.

That if jurisdiction be retained by this Honorable Court and the Canadian rule of damage in favor of cargo owner be applied Paterson Steamships Limited by reason of the fact that the officers and members of the crew of the Steamer Yorkton are citizens and residents of the Dominion of Canada will be unable to exercise jurisdiction over them, and to compel such officers and members of the crew of the Steamer Yorkton to testify herein, and that as a result Paterson Steamships Limited will be left without any effectual remedy towards showing fault upon the part of the Steamer Yorkton as the cause of such collision and resultant damage.

That since it appears upon the face of the libel herein and from the affidavits submitted herewith that the libelant is a non-resident, and subject of the Dominion of Canada, and the respondent is a non-resident corporation and subject of [fol. 108] the Dominion of Canada, that the contract of carriage was made by the libelant, a Canadian corporation, with a Canadian owned and registered vessel, under a bill of lading subject to the Canadian statutes; that the contract of carriage was to be performed between two ports in the Dominion of Canada, and no part of the same was to be executed within the United States, and that it is governed by the law of the Dominion of Canada; that the collision took place between two vessels owned by subjects of the Dominion of Canada, and that nearly, if not all, of the witnesses were residents and citizens of the Dominion of Canada, if jurisdiction be retained by this Honorable Court it will result that this Honorable Court will not be able to do even-handed justice to the parties in accordance with the law of the Dominion of Canada. That, by reason of the matters and things hereinbefore set forth, the convenience of the parties will be greatly served by the trial and disposi-

tion of the pending cause in the Courts of the Dominion of Canada, rather than within this jurisdiction.

That as appears by the affidavit of Ermin Burton Sutherland, submitted herewith, that an action by Paterson Steamships Limited against the owners of the Steamer Yorkton, Mathews Steamship Company Limited, in respect of the damage occasioned by the said collision has been instituted, and is now pending in the Toronto Admiralty District of the Exchequer Court of Canada, and in that action the said Court will be called upon to determine the [fol. 109] question of liability as between the said ships and their owners, and unless this Honorable Court will refuse to entertain or exercise jurisdiction a multiplicity of actions will result.

That if this Honorable Court will refuse to exercise jurisdiction and will dismiss the libel herein and cancel the bond heretofore given herein, Paterson Steamships Limited is prepared to furnish, and will furnish, a valid bond for a like amount in any action in rem which the present libelant may institute in any Admiralty District of the Exchequer Court of Canada, as security for whatever claim in damages the libelant may have.

That when libelant placed its grain on board a Canadian registered vessel for carriage between two Canadian ports under a contract of carriage subject to Canadian Law, it thereby subjected itself to the law of Canada; and the matter of liability or obligation, and the extent thereof, as determined by the law of Canada, should bind libelant in seeking recovery for the amount of its loss or damage, and the right of Paterson Steamships Limited to have such law and obligation enforced should not be denied. It, therefore, follows that this Court in the exercise of its equitable powers and of the discretion vested in it as to the exercise of jurisdiction herein should decline to take or entertain jurisdiction herein, and should remit the parties to the Courts of the Dominion of Canada taking cognizance [fol. 110] of the matters and things hereinbefore set forth.

That this motion is made upon the return day of process issued under the libel herein and prior to the respondent having filed any answer to said libel in this Court.

That attached hereto and made a part hereof by reference is a copy of the report of the Dominion Wreck Commissioner made as a result of investigation held at the City of

Toronto, on July 23rd, 24th and 25th, 1930, into the circumstances attending the collision between the SS. Yorkton and the SS. Mantadoc. That reference is hereby made to such report in full for the purpose of showing to the Court the apparent fault upon the part of the Master of the Steamer Yorkton as well as that upon the part of the Steamer Mantadoc, as a result of which such collision occurred, and that said report is hereby referred to in full and made a part hereof.

That the Rules of the Road for the Great Lakes as promulgated by Order in Council of the 4th February, 1916, and as issued by Department of Marine and Fisheries, Canada, violations of which are stated in said report to have been the cause of said collision, read as follows:

"Rule 19. Every vessel shall, in thick weather, by reason of fog, mist, falling snow, heavy rainstorms, or other causes, go at moderate speed. A steam vessel hearing, apparently not more than four points from right ahead, the [fol. 111] fog signal of another vessel shall at once reduce her speed to bare steerageway, and navigate with caution until the vessels shall have passed each other."

"Rule 22. If, when steamers are approaching each other, the pilot of either vessel fails to understand the course or intention of the other, whether from signals being given or answered erroneously, or from other causes, the pilot so in doubt shall immediately signify the same by giving the danger signal of five or more short and rapid blasts of the whistle; and if both vessels shall have approached within half a mile of each other, both shall be immediately slowed to a speed barely sufficient for steerageway, and, if necessary, stopped and reversed, until the proper signals are given, answered and understood, or until the vessels shall have passed each other."

"Rule 23. Steam vessels are forbidden to use what has become technically known among pilots as 'cross signals'—that is, answering one whistle with two, and answering two whistles with one. In all cases, and under all circumstances, a pilot receiving either of the whistle signals provided in the rules, which for any reason he deems injudicious to comply with, instead of answering it with a cross

signal, shall at once sound the danger signals and observe the rule applying thereto (Rule 22)."

"Rule 30. When two steamers are approaching each [fol. 112] other at right angles or obliquely so as to involve risk of collision, other than when one steamer is overtaking another the Steamer which has the other on her own port side shall hold her course and speed; and the steamer which has the other on her own starboard side shall keep out of the way of the other by directing her course to starboard so as to cross the stern of the other steamer, or, if necessary to do so, slacken her speed or stop or reverse. The steamer having the other on her own port bow shall blow one blast of her whistle as a signal of her intention to cross the bow of the other, holding her course and speed, which signal shall be promptly answered by the other steamer by one short blast of her whistle as a signal of her intention to direct her course to starboard so as to cross the stern of the other steamer or otherwise keep clear."

"If from any cause whatever the conditions covered by this situation are such as to prevent immediate compliance with each other's signals, the misunderstanding or objection shall be at once made apparent by blowing the danger signal, and both steamers shall be stopped, and backed if necessary, until signals for passing with safety are made and understood."

"Rule 32. When two steam vessels are crossing so as to involve risk of collision the vessel which has the other on [fol. 113] her own starboard side shall keep out of the way of the other."

"Rule 34. Where, by any of the rules herein prescribed, one of the two vessels shall keep out of her way, the other shall keep her course and speed."

"Rule 35. Every steam vessel which is directed by these rules to keep out of the way of another vessel shall, on approaching her, if necessary, slacken her speed or stop or reverse."

"Rule 37. In obeying and construing these rules due regard shall be had to all dangers of navigation and collision and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger."

"Rule 38. Nothing in these rules shall exonerate any vessel, or the owner or master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case."

Wherefore deponent prays for an order and decree of this Court granting the relief sought by respondent upon this motion, viz., that the Court exercise the discretion conferred upon it by operation of law and refuse to take and entertain further jurisdiction of the above entitled action; [fol. 114] that the Court dismiss the libel herein, and that the Court will remit the libelant to its remedies in the Courts of the Dominion of Canada; that the Court direct that the bond and stipulation heretofore given and filed herein by Paterson Steamships Limited, with the American Surety Company of New York, as surety, be cancelled and discharged of record, and that the respondent have such other and further relief as may be incidental thereto or proper in the premises.

Ellis H. Gidley.

Sworn to before me this 8th day of September, 1930.
Arthur E. Otten, Notary Public, Erie Co., N. Y.

[fol. 115] In United States District Court, Western District of New York

In Admiralty

Canada Malting Company, Ltd., Libelant,

against

Paterson Steamships, Ltd., Respondent

British Empire Grain Company, Ltd., Libelant,

against

Paterson Steamships, Ltd., Respondent

HENRY K. STARNES & COMPANY, Libelant,

against

PATERSON STEAMSHIPS, LTD., Respondent

ANSWERING AFFIDAVIT OF ANDREW J. McELHINNEY

STATE OF NEW YORK,
County of Erie, ss:

Andrew J. McElhinney, being duly sworn, deposes and says:

That he is an attorney in the office of Messrs. Bigham, Englar, Jones & Houston, associate counsel for the libel- [fol. 116] ants herein, and is familiar with all matters relating to the above causes of action, having made a personal investigation into the facts relating to the accident at the scene of the collision, and having examined documents and papers in connection therewith.

On July 23, 1930 your deponent proceeded to Toronto, Canada where the Dominion Wreck Commissioner's Court was conducting a hearing with respect to the above accident with a view to fixing liability. Your deponent appeared at that hearing on behalf of libelants as owners of cargo on board the Steamship "Yorkton." Lea Hinslea, Esquire, appeared for the Steamship "Yorkton", and Rufus C. Holden, Jr., Esquire, appeared for the Steamship "Mantadoc." The captain, second officer, wheelsman and chief engineer of the "Yorkton" were produced and examined by the court and cross-examined by counsel. The captain, second officer, wheelsman, lookout and chief engineer of the "Mantadoc" were likewise produced and examined both by the court and by opposing counsel. Counsel for both parties appearing in the present suits, as well as counsel for the "Yorkton", appeared and cross-examined fully the various witnesses produced. The hearing continued from July 23rd to July 25th, on which day it was closed with arguments by counsel representing the various interests referred to above. During the course of the testimony, the captain of the "Mantadoc" fixed the point of collision on the United States Army Chart for the eastern end of Lake Superior at a place approximately three and one-half [fol. 117] miles N. N. W. of Whitefish Point, Michigan. On

the United States Army General Chart of Lake Superior, the captain of the "Yorkton" placed the point of collision as about nine and one-half miles N. N. W. of Whitefish Point, Michigan. Both of the charts referred to were marked in evidence and received as exhibits at the Wreck Commissioner's hearing. The points fixed by both captains are well within the territorial waters of the United States as indicated by the international boundary lines shown on both charts, copies of which will be produced on the argument of this motion.

On or about August 6, 1930, your deponent received from the Dominion Wreck Commissioner a copy of the report and judgment of the Wreck Commissioner's Court, holding the captains of both the "Mantadoc" and the "Yorkton" at fault for the collision and suspending their licenses for the rest of the season.

No action was instituted by the Paterson Steamships, Ltd., owner of the "Mantadoc", until after the entire testimony taken by the Wreck Commissioner's Court was heard and the "Mantadoc" counsel had opportunity to cross-examine the officers and crew of the "Yorkton", and no action was instituted by them until several weeks after the report and judgment of the Wreck Commissioner's Court, holding both vessels at fault, had been filed. Your deponent is informed and believes that no such action was instituted [fol. 118] by Paterson Steamships, Ltd., owner of the "Mantadoc", until at least a month after the institution of the present suits in this court. Action was then brought in the Toronto Admiralty Court against the Steamship "Yorkton" to recover for the damage to the "Mantadoc." Your deponent is informed and believes that the actual physical damage suffered by the "Mantadoc" amounts to about $16,000. Your deponent is also informed and believes that the damage to the "Yorkton" is made up of the following items:

Cost of raising the "Yorkton" and towing her to Fort William, Ontario	$25,000
Cost of pumping overboard damaged cargo	6,000
Estimated cost of repairs	45,000
Total	$76,000

This information is based on personal reports received by deponent and personal observation of the "Yorkton" as she lay beached below Whitefish Point.

The fact that suit was instituted by respondent in a Canadian court more than a month after the present actions were instituted and after the Wreck Commissioner's Court had made its findings is now urged by respondent as a reason why this court should refuse to exercise jurisdiction. In view of the fact that the physical damage to the "Mantadoc" amounts to only $16,000 and that the damage to the "Yorkton" amounts to $76,000, [fol. 119] and that by instituting suit in a Canadian court to recover the damage to the "Mantadoc", respondent will subject itself to a cross-suit for damages amounting to $76,000, it is quite obvious that the only purpose in instituting the suit in the Toronto court was that respondent might urge the pendency of such suit as an additional reason why this court should refuse to retain jurisdiction in the present actions.

It has been dependent's experience that actions in admiralty courts of Canada involve great delay. In one instance, after the institution of suit, the action was not reached for trial for several years and, accordingly, the action was finally disposed of by settlement in order to avoid further delay. Your deponent has been informed and believes that if the actions instituted in this court are prosecuted with diligence, they will be reached for trial in the course of three or four months, whereas if the court refuses to retain jurisdiction and remits libelants to the courts in Canada, trial will not be had for a period greatly in excess of that time, and libelants will suffer a serious inconvenience, injustice and loss of time in collecting the amount of their damage where admittedly no fault can be urged against them, and the sole question involved is whether respondent alone or some other party should pay the damage suffered by libelants.

The reason most strongly urged by respondent in support of its contention that this court should not retain [fol. 120] jurisdiction over the pending suits is that respondent, in the event of a holding by the court that both vessels are at fault, will be compelled to pay the entire damage sustained by libelants, amounting to about $60,000, whereas if libelants are compelled to resort to Ca-

nadian courts the amount of their recovery will be only $30,000. An examination of the outcome of the present litigation, in the event that the court should hold both the "Yorkton" and "Mantadoc" at fault, will show, however, that the contention of the respondent is without merit and that it would fare equally as well whether the trial is had in American or Canadian courts. If the present suits are allowed to proceed in the American court and the Steamship "Yorkton" or her owner is brought into the present suits in the manner suggested below, the result would be that the owner of the "Yorkton" would immediately file a cross-libel for the amount of its damage. As stated above, the amount of damage sustained by the "Yorkton" is $76,000. The damage to the "Mantadoc" is $16,000. If a trial is then had and the court finds both vessels at fault, libelants would recover their damages amounting to approximately $60,000 from the "Mantadoc." The owner of that vessel in turn would be entitled to recoup half of this sum, i. e., $30,000, and half the amount of its own damage, i. e., $8,000, or a total of $38,000 against the claim of the "Yorkton." As the damage to the "Yorkton" is $76,000, her owner would be entitled to half of that amount, i. e., $38,000, against the "Mantadoc," thus off-[fol. 121] setting the claim of the "Mantadoc" for a similar sum. In other words, the total loss which the respondent, as owner of the "Mantadoc," would sustain if the actions are tried in this court, would be the amount of damage to the "Mantadoc," $16,000, and the cargo damage paid to libelants, $60,000, making a total of $76,000. As the loss of the "Yorkton" is approximately the same amount, it is obvious that in a half damage decision neither vessel would recover from the other, the loss of both vessels being the same. If, on the other hand, the action is tried in Canada, libelants would recover only half of their damage, i. e., $30,000, from the owner of the "Mantadoc," who would not be able to recoup any part of this amount from the "Yorkton's" claim. Furthermore, on cross-libels between the vessel owners the "Mantadoc" would have to pay to the owner of the "Yorkton" one-half the difference between their damages, or $76,000 less $16,000 divided by two, amounting to $30,000. The final result would be that the owner of the "Mantadoc" would pay $30,000, representing the cargo loss to libelants, $30,000 to the owners

of the "Yorkton," and would itself bear the damage to the "Mantadoc," amounting to $16,000, so that the total amount of its loss in a Canadian court would be $76,000, which is the identical amount of the loss it would sustain in the event that the trial was had in this court. It is clear, therefore, that respondent cannot suffer any financial loss, regardless of which court the cases are tried in.

[fol. 122] As the damage to the "Yorkton" so greatly exceeds that of the "Mantadoc," no recovery could be had by the owners of the "Mantadoc" against the "Yorkton" in either court under a half damage decision, by reason of the figures as given above. Accordingly, the question of whether the value to which the "Yorkton" could limit its liability in an American court would be much less than that to which it could limit its liability in a Canadian court, is of no importance and entitled to no weight in considering the merits of this application.

In these calculations no account has been taken of claims for loss of use on the part of the respective vessel owners as these claims are unliquidated, but it is clear that the claim of the owners of the "Yorkton" will greatly exceed that of the owners of the "Mantadoc," as to this item, as the period of the loss of use of the "Yorkton" greatly exceeds that of the "Mantadoc," consequently the "Mantadoc's" owners cannot hope for a recovery against the "Yorkton" in either court.

It is asserted in the moving affidavits that the "Yorkton" in her present condition is of little or no value and that she will probably not be repaired but abandoned as a total loss. Your deponent, however, is informed and believes that such is not the fact but, on the contrary, that the "Yorkton" will be repaired as her value in such repaired condition will greatly exceed the amount which it [fol. 123] will be necessary to spend in putting her in a sound condition. The affidavit of a competent appraiser is submitted herewith, estimating the value of the "Yorkton" in a sound condition to be about $125,000, so that her value in a repaired condition would exceed the cost of repairs and salvage by about $50,000. It seems unreasonable and improbable that the owner of the "Yorkton," after having made a careful examination of that vessel as she lay beached after the accident, would expend the sum of $31,000 to have her raised and towed to Fort William, Ontario,

only to abandon her as a total loss not worth repairing. Furthermore, I am informed and believe that the "Yorkton" is now actually being repaired by the owners at a cost of $45,000, repairs to take 30 days for completion.

It is contended on behalf of respondent, that this court should refuse to retain jurisdiction, by reason of the fact that respondent will be unable to bring the "Yorkton" or her owner into the present actions. . There is no merit to this contention, however, for it will be observed from affidavits submitted herewith, that vessels owned by the Matthews Steamship Company, owner of the "Yorkton," are continually coming into and leaving the port of Buffalo. Thus, in the period covering the last week of July, the month of August and the first week in September, vessels owned by the Matthews Steamship Company were in the port of Buffalo on July 25th, August 10th, August 23rd, [fol. 124] August 25th, August 27th and September 5th or at intervals, on an average, of about every week. As the Matthews Steamship Company has a fleet of about twenty (20) vessels which operate in the Great Lakes and St. Lawrence River, with Toronto as their home port, it is clear that no difficulty would be experienced by respondent in attaching one of these vessels in the port of Buffalo by writ of foreign attachment, and jurisdiction thereby obtained over the owner of the "Yorkton" in the same fashion in which jurisdiction was obtained over the respondent in the present suits.

Inconvenience to witnesses is also urged as a reason why the court should refuse to retain jurisdiction, on the ground that the witnesses all reside in Canada. The home port of the respondent is given as Fort William, Ontario. An examination of the time tables of the Canadian Pacific Railroad Company shows that Fort William is 813 miles from Toronto, where the action instituted by respondent against the Steamship "Yorkton" is now pending. The time tables of the Canadian Pacific Railroad Company also show that the running time between Fort William and Toronto is twenty-four hours. The time tables of the New York Central Railroad Company show that the distance between Toronto and Buffalo is about 116 miles and that this distance can be covered in three hours and fifteen minutes. If the witnesses on behalf of the "Mantadoc" are transported by rail from Fort William to Toronto a total

distance of 813 miles, in twenty-four hours, the additional [fol. 125] journey from Toronto to Buffalo of slightly over 100 miles, in slightly over three hours, certainly would not constitute a serious inconvenience to such witnesses. Furthermore, the ships of respondent are continually passing through the port of Buffalo, where respondent in fact has a local agent, so that the port of Buffalo would be nearer than the port of Toronto if the witnesses were transported by ship instead of by rail as would be more probable, under the circumstances. It is usual, however, in such cases to take the depositions of most of the witnesses, and if the usual practice in this respect is followed, the depositions of the members of the crew of the "Mantadoc" will undoubtedly be taken at points of convenience to the respondent, so that the question of convenience of witnesses cannot be seriously urged as a reason why this court should refuse to retain jurisdiction.

Andrew J. McElhinney.

Sworn to before me this 22nd day of September, 1930. W. Alexander Eldridge, Notary Public, Erie Co., N. Y.

[fol. 126] In United States District Court, Western District of New York

Canada Malting Company, Libelant,

vs.

Paterson Steamships, Limited, Respondent

Affidavit of Edward N. Smith

State of New York,
County of Erie, ss:

Edward N. Smith, being duly sworn, deposes and says: That he resides in the Village of Snyder, New York, and is engaged in business with an office in the City of Buffalo, New York, as an independent marine surveyor, and that prior to engaging in business as an independent marine surveyor, he had many years experience as a shipbuilder

and repairer, and that he is familiar with lake vessels of all types of construction and is familiar with the values of lake ships.

That deponent knows the Steamer "Yorkton"; that he has seen her a number of times and that within the past year deponent was on board said steamer in the Welland Canal; that in the opinion of deponent, the fair value of the Steamer "Yorkton" in sound condition is about $125,000.00.

[fol. 127] That deponent is informed and believes that as result of the collision on July 10, 1930 between the Steamer "Yorkton" and the Steamer "Mantadoc", no abandonment of the said Steamer "Yorkton" was ever tendered by her owners to her underwriters, and that the damage to said Steamer "Yorkton" was not such as to make the said Steamer "Yorkton" a constructive total loss. Deponent is further informed and believes that the Steamer "Yorkton" was raised from her sunken condition by the Great Lakes Towing Company, and delivered at Port Arthur, for about $25,000.00, plus some additional expense of about $6,000.00 for jettisoning the damaged grain aboard her before taking the steamer into Port Arthur, and said steamer was delivered at Port Arthur about August 18th, 1930, and deponent is informed and believes that the repair of the damage to the Steamer "Yorkton" is now being made at Port Arthur, and that the estimated cost of repairs is about $45,000.00 and that it is estimated that the repairs will be completed in about thirty days from the time they started.

That deponent believes that the value of the Steamer "Yorkton" in sound condition exceeds very considerably the amount of the cost of salvaging said steamer and the expense of and in connection with her repairs arising out of said collision.

Deponent is further informed and believes that repair of the damage to the Steamer "Mantadoc" sustained in [fol. 128] said collision has been made at an expense of about $16,000.00, and that said repairs to the Steamer "Mantadoc" were made between July 16th and July 31st, 1930.

Ed. N. Smith.

Subscribed and sworn to before me this 22 day of September, 1930. W. Alexander Eldridge, Notary Public in and for Erie County, N. Y.

IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

CANADA MALTING COMPANY, Libellant,

vs.

PATERSON STEAMSHIPS, LIMITED, Respondent

AFFIDAVIT OF CHARLES SCHULTZ

STATE OF NEW YORK,
County of Erie, ss:

Charles Schultz, being duly sworn, deposes and says:

1. That he resides in the City of Buffalo, New York, and is employed as a Clerk in the office of the Collector of Customs at Buffalo, New York, and that he is the Clerk [fol. 129] who enters and clears vessels arriving and departing from the Port of Buffalo, New York, which are under the law required to enter and clear.

2. That on July 23rd, 1930, the Master of the Steamer "Royalton" made entry of said vessel before deponent, and on July 24th, 1930, the Master of the Steamer "Royalton" cleared said vessel before deponent, and that it appears by the "Inward Foreign Manifest" and U. S. Shipping Board form No. 7801, required to be filed by said master, that said Steamer "Royalton" was at said times owned by Mathews Steamship Company, Limited.

3. That on August 25th, 1930, the master of the Steamer "Mathewston" entered and cleared said vessel before deponent, and that it appears by the "Inward Foreign Manifest" and U. S. Shipping Board form No. 7801, required to be filed by said master, that said Steamer "Mathewston" was at said time owned by Mathews Steamship Company, Limited.

Chas. Schultz.

Subscribed and sworn to before me this 15th day of September, 1930. Harold K. Duchmann, Notary Public, Erie Co. N. Y. (Seal.)

[fol. 130] IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

CANADA MALTING COMPANY, Libellant,

vs.

PATERSON STEAMSHIPS, LIMITED, Respondent

AFFIDAVIT OF JAMES W. LANIGAN

STATE OF NEW YORK,
County of Erie, ss:

James W. Lanigan, being duly sworn, deposes and says: That he is employed in the United States Customs Service, stationed at Black Rock; that foreign ships bound to and from the Port of Tonawanda are entered and cleared by the Black Rock office, and that deponent has examined the record of entries and clearances of vessels at Tonawanda, and that according to such records, the Steamer "Southton" entered on July 26, 1930, and cleared on July 31, 1930, and that said Steamer "Southton" entered on August 10, 1930 and cleared on August 14, 1930, and that said Steamer "Southton" entered on August 27, 1930, and cleared on August 31, 1930, and that according to the "Inward Foreign Manifests" filed by the master of said steamer at each time of entry, said steamer was at said times owned by Mathews Steamship Company, Limited.
[fol. 131] That according to said records, the Steamer "Malton" entered the Port of Tonawanda on August 23, 1930 and cleared on August 26th, 1930, and that according to the "Inward Foreign Manifest" filed by the master of said steamer, she was at said time owned by Mathews Steamship Company, Limited.

That according to said records, the Steamer "Fulton" entered the Port of Tonawanda on August 31st, 1930 and cleared on September 5, 1930, and that according to the "Inward Foreign Manifest" filed by the master of said steamer, she was at that time owned by Mathews Steamship Company, Limited.

James W. Lanigan.

Subscribed and sworn to before me this 18th day of September, 1930. Laurence E. Coffey, Notary Public, Erie County, N. Y. (Seal.)

[fol. 132] IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

CANADA MALTING COMPANY, LIMITED, Libellant,

against

PATERSON STEAMSHIPS, LIMITED, Respondent

BRITISH EMPIRE GRAIN COMPANY, LIMITED, Libellant,

against

PATERSON STEAMSHIPS, LIMITED, Respondent

HENRY K. STARNES, Doing Business as H. K. Starnes & Company, Libellant,

against

PATERSON STEAMSHIPS, LIMITED, Respondent

Brown, Ely & Richards (Laurence E. Coffey, of Counsel), Buffalo, N. Y., and Bigham, Englar, Jones & Huston (Leonard J. Matteson, and A. J. McElhinney, of Counsel), New York City, for Libellant.

Stanley & Gidley, Buffalo, N. Y., for Respondent.

OPINION OF HAZEL, J.

[fol. 133] On Motion to Dismiss

HAZEL, District Judge:

On the night of July 9th, 1930, the steamers Yorkton and Mantadoc collided in Whitefish Bay, Lake Superior within the territorial waters of the United States. The above entitled actions in personam were brought in this jurisdiction against the owner of the Mantadoc alone, and foreign attachments issued by owners of separate cargoes of grain laden aboard the Yorkton which, in consequence of the collision, sank, and the cargoes totally lost. Both vessels are of Canadian registry. Libellants and respondent are foreign citizens, subjects of the Dominion of Canada. The Yorkton was loaded at Port Arthur, Ont., where the contracts of affreightment were made, and the bills of lading issued for delivery of the cargoes at Montreal, Que. An action by the respondent owner of the Steamer Mantadoc

is pending against the claimants of the Steamer Yorkton in the Admiralty Court of the Dominion of Canada to determine the fault of the collision between the two vessels and their owners. The motion herein seeks to have this court decline further jurisdiction of the pending causes, and for dismissal of the libels.

Concedely whether jurisdiction shall be retained is a matter of discretion, and the exercise of the discretion depends upon the facts and circumstances contained in the affidavits. (See Charter Shipping Co. Ltd. vs. Bowring, [fol. 134] Jones & Tidy, decided by the Supreme Court May 19, 1930.) The moving papers show not only that all the parties, including the colliding vessels and their officers and crews, are citizens and residents of Canada, but also that the Dominion Wreck Commissioner has had the cause of the collision under investigation, and on the evidence before him has reached the conclusion that both vessels were equally at fault for the mishap—both having committed culpable error due to faulty interpretation of the rules of navigation and their negligent application. It is pointed out that under existing United States law, assuming a finding of mutual fault on the part of the navigating vessels, the respondent here would be held liable under Admiralty Rule 56 for the entire amount of the cargo damage without any effective remedy for recoupment of one-half of cargo damages against the Yorkton in this action, and, on recovery of the damages, to enforce contribution, another action would be necessary by the claimants of the Mantadoc against the owner of the Yorkton. (See The New York, 175 U. S. 187; Erie R. R. Co. vs. Erie & Western Transp. Co. 204 U. S. 220); while, on the other hand, the remission of the actions to the Admiralty Court of Canada, where the rule is the same as in England, would not in any event involve liability of respondent for more than a moiety of the cargo damage recoverable from each of the vessels found at fault.

It seems to me that the circumstances are such that this court is warranted in refusing to retain jurisdiction, and [fol. 135] that no injustice will result to libellants by remitting the parties to their home forum. That the rule in this court is more favorable to the cargo owners is insufficient reason for retaining jurisdiction.

Plaintiff in opposition urges that inasmuch as the collision occurred within the territorial water of the United States, jurisdiction should not be declined, citing The Heredia vs. Davis, 12 Fed. (2d) 500, and several other adjudications. But in the Heredia case the action was for personal injuries by a foreign seaman against a foreign ship, the injuries occurring owing to the negligence of the latter in an American port, and the court deemed it necessary to exercise jurisdiction to prevent failure of justice; while in the instant case, as said, no failure of justice would result by refusing jurisdiction and relegating the rights of the parties to the courts of their citizenship. That all the parties in interest are citizens of a foreign country, true enough, standing alone, constitutes no objection to retaining jurisdiction, but I think the reasons assigned in these cases for not doing so are meritorious. The collision of the steamships in Whitefish Bay in American waters does not, in my opinion, demand applying the law of the United States on the principle of lex loci in the determination of liability. (See Charter Shipping Company vs. Bowring, et al., supra, where the cause of action arose in waters at Jacksonville, Florida.) In that case the Supreme Court said:

[fol. 136] "Both the parties being British subjects, and the present litigation, as well as the suit pending abroad, apparently involving the applications of English Law to the fund located there, it was for the District Court to say, as it did, upon a consideration of all the circumstances, whether it should decline 'to take cognizance of the case if justice would be done as well by remitting the parties to the home forum'. See The Maggie Hammond, (9 Wall. 457, 19 L. Ed. 780)." * * *

"It was for the District Judge to consider the facts appearing and the inferences which he might draw from them, and reach his own conclusion as to the convenience of witnesses, as well as the other factors upon which he decided that justice would be best served by leaving the parties to their suit in England."

The case of Royal Mail Steam Packet Co. vs. Companhia De Navegacao Lloyd Brasileiro, 27 Fed. (2d) 1002 is cited

in support of the contention that jurisdiction should be retained, but I think that in that case the circumstances were essentially different. There libelant was a British corporation and respondent a Brazilian corporation. The collision occurred in Belgian waters, and, as I read Judge Inch's opinion, he bases his determination upon the injustice that would ensue to libellant by requiring a determination in the Belgian court because the law of that country had not been revised since the World War "to bring it into line with the [fol. 137] depreciation of the Belgian currency." The result, the learned court said, from the depreciation of the Belgian francs, together with the Belgian law limiting liability to 200 francs per gross ton, and allowing the respondent at fault to limit its liability, would enable unjustly avoiding a large part of the damages. The collision here did not occur on the high seas, as in the last mentioned case, but occurred at a point where the inland waters narrowed to a neck, and where it may be assumed the colliding vessels proceeded in United States waters unintentionally or unavoidably. In Fairgrieve vs. Marine In. Co., 94 Fed. 686, the policy of insurance on the Canadian schooner was issued in this country, and the Court was of opinion that, since the validity of the contract was to be determined by the laws of this country, no rules of comity would be violated by retaining the litigation. The adjudication is believed to support respondent's contention rather than libellant's. All other citations for retaining jurisdiction are readily distinguishable from the facts here.

There is another point that bears upon the exercise of discretion, to wit, the hearing and finding of the Canadian Wreck Commissioner, the pending action in the Canadian court brought by the respondent owner of the Mantadoc against the owner of the Yorkton to determine the liability for the collision as between the vessels and their owners. It would certainly lead to complications to have the Cana- [fol. 138] dian Court of Admiralty determine the liability one way, and this Court another way. Such antagonistic determinations might lead to a multiplicity of actions to determine the rights and liabilities of the parties—something that should be avoided. Other arguments in favor of retaining jurisdiction have been considered but are deemed

insufficient. The motion of respondent is granted, and an order on five day's notice to libellant may be entered.*

Dated October 1st, 1930.

——, U. S. D. J.

[fol. 139] In United States District Court, Western District of New York

Canada Malting Co., Ltd., Libellant,

against

Paterson Steamships, Ltd., Respondent

British Empire Grain Co., Ltd., Libellant,

against

Paterson Steamships, Ltd., Respondent

Henry K. Starnes, Doing Business as H. K. Starnes & Company, Libellant,

against

Paterson Steamships, Ltd., Respondent

Petition for Rehearing

The libellants respectfully petition this Court for rehearing on the application of the respondent to dismiss the libels. The grounds of petitioners' application are as follows:

[fol. 140] 1. The statement in the opinion that "the fact that the collision occurred in American waters does not in my opinion demand applying the law of the United States on the principle of lex loci in the determination of liability" is contrary to the decisions of the United States Supreme Court and the established law both of the United States and England. The Court has, therefore, approached

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*The order shall provide for respondent's appearance in any action brought in Canada by cargo owners and file bond for recovery of damages.

the questions presented by this application from a point of view which is fundamentally wrong.

2. The Court has no discretion or authority to dismiss the libels.

3. The Court has misapprehended the situation with respect to this litigation and has given undue weight to the grounds urged by the respondent for the exercise of discretion against jurisdiction. The remission of the litigants to the Canadian forum will work serious hardship and injustice to the libellants with no corresponding benefit to the respondents.

Respectfully submitted.

By Leonard J. Matteson, Proctor. Brown, Ely & Richards, Bigham, Englar, Jones & Houston, Proctors for Libellants. Laurence E. Coffey, Leonard J. Matteson, A. J. McElhinney, of Counsel.

[fol. 141] In United States District Court, Western District of New York

Canada Malting Company, Limited, Libellant,

against

Paterson Steamships, Limited, Respondent

British Empire Grain Company, Limited, Libellant,

against

Paterson Steamships, Limited, Respondent

Henry K. Starnes, Doing Business as H. K. Starnes & Company, Libellant,

against

Paterson Steamships, Limited, Respondent

Brown, Ely & Richards (Laurene E. Coffey, of Counsel), Buffalo, N. Y., and Bigham, Englar, Jones & Houston, (Leonard J. Matteson and A. J. McElhinney, of Counsel), New York City, for Libellant.

Stanley & Gidley, Buffalo, N. Y., for Respondent.

[fol. 142] On Application for Rehearing

1. The word "concededly" in paragraph two, page one of the opinion heretofore filed, is stricken out in view of the misunderstanding of the court as to the position of proctors for libellants in this respect.

The statement in the opinion: "The collision of the steamships in Whitefish Bay in American waters does not, in my opinion, demand applying the law of the United States on the principle of lex loci in the determination of liability", may also be eliminated. It was unnecessary to the decision of the questions submitted, and doubtless, as claimed, was an erroneous statement of the prevailing rule. Whether the ultimate facts here warrant applying a different rule need not be decided.

It is also true, as said by proctor for respondents, that the liability in general average, as held in Charter Shipping Co. vs. Bowring, et al., was not due to the contract but to participation in a common venture, and adjustment depended upon the law of the port of destination after arrival of the vessel. But the principle of that case, with relation to the discretionary right of the court to retain or refuse jurisdiction in view of the facts and circumstances in the instant case, is not inapplicable. On this motion for rehearing proctors for respondent point out that by treaty relations between Great Britain and the United States the boundary waters of the Great Lakes, meaning thereby the [fol. 143] entire body of water comprising lakes, rivers and waterways, separating the two countries, with respect to navigation have become international waterways and equally free to citizens of Canada and citizens of the United States (see Root-Bryce Treaty of 1909, and President's Proclamation of May 13th, 1910; More's Digest of International Law, Vol. I, page 674).

In view of this treaty, there exists, it seems to me, additional reason for declining jurisdiction and relegating the parties to pursue their remedies and rights in the country of which they are citizens and subjects, in the place where the contract of carriage was made and performed, and, further, where the witnesses reside. But assuming, as does libellant, that the collision occurred in American waters,

the contention is that this court is without power to refuse jurisdiction, since sec. 541 of the Judicial Code confers original jurisdiction in the District Court of all causes of admiralty and maritime jurisdiction.

It was not intended to rule that in such case the court was without jurisdiction, but merely that the circumstances were such as to justify the court in declining jurisdiction. The right to take or refuse jurisdiction for special reasons is recognized in The Belgenland, 114 U. S. 355, wherein instances are mentioned rendering it expedient for the court to take jurisdiction of suits between foreigners in causes [fol. 144] "not arising in the country of the forum * * * not on the ground (the learned court says) that it has not jurisdiction; but that from motives of convenience or international comity, it will use its discretion whether to exercise jurisdiction or not." The phrase "not arising in the country of the forum" does not make it obligatory to retain jurisdiction if substantial reason existed for refusing it. The New Texas, 1926 American Maritime Cases, 1515; Goldman vs. Furness, Witby & Co. Ltd., 101 Fed. 467; The Iquitos, 286 Fed. 384. And see The Maggie Hammond 9 Wall. page 457.

Other points presented for retaining jurisdiction need not be discussed.

The order declining jurisdiction may be entered.

Dated January 2nd, 1931.

John R. Hazel, U. S. D. J.

[fol. 145] In United States District Court, Western District of New York

In Admiralty

Canada Malting Company, Limited, Libelant,

vs.

Paterson Steamships, Limited, Respondent

Final Decree Dismissing Libel of Canada Malting Company, Limited—Jan. 12, 1931

The respondent having filed bond and notice of appearance herein, following attachment of respondent's Str.

Lachinedoc herein, and having further filed exceptions to the libel herein, together with its suggestion that the Court ought not to entertain or exercise further jurisdiction over the above entitled action by reason of the matters and things therein stated, and respondent having made a motion for an order and decree of this Court, decreeing that [fol. 146] the Court exercise the discretion conferred upon it by operation of law and refuse to take and entertain further jurisdiction of the above entitled action, and further that the Court dismiss the libel herein and vacate the writ of foreign attachment heretofore granted and served herein at the Port of Buffalo upon the Str. Lachinedoc, the property of respondent Paterson Steamships, Limited; and further that the Court remit libelant to its remedies in the Courts of the Dominion of Canada; and further that the Court direct that the bond and stipulation heretofore given and filed herein by respondent Paterson Steamships, Limited, with American Surety Company of New York as surety, for the release of the Str. Lachinedoc from arrest and attachment under the writ of foreign attachment heretofore issued and served herein upon the prayer of libelant, be cancelled and discharged of record and that the Clerk of this Court so mark said bond and stipulation; and further for such other and further relief herein as may be incidental thereto or proper in the premises, and said motion being returnable upon the 15th day of September, 1930, said day being the return day of process issued upon the libel filed herein, and said exceptions and motion having duly come on to be heard upon said 15th day of September, 1930, and having been duly adjourned until the 22nd day of September, 1930, by stipulation made at the request of proctors for libelant, and having thereafter duly come on to be heard upon said 22nd day of September, 1930, and [fol. 147] having been duly argued and submitted by Ellis H. Gidley, Esq., and Ray M. Stanley, Esq., of Counsel for respondent in support thereof, and by Leonard J. Matteson, Esq., of Counsel for libelant in opposition thereto;

And on reading and filing the said exceptions together with the suggestion of the respondent and the notice of said motion, the affidavit of Erwin Burton Sutherland, duly sworn to the 6th day of September, 1930; the affidavit of William W. Hall, duly sworn to the 4th day of September, 1930; the affidavit of Rufus Clement Holden, Jr., duly

sworn to the 4th day of September, 1930; the affidavit of George D. MacDonald, duly sworn to the 8th day of September, 1930; the affidavit of Ellis H. Gidley, duly sworn to the 8th day of September, 1930, with proof of due service thereof upon the proctors for libelant, and upon the libel filed herein and the writ of foreign attachment heretofore issued out of this Court and the return of the Marshal thereto, and the notice of appearance filed by respondent, in support of said exceptions and motion; and on reading and filing the affidavit of Andrew J. McElhinney, duly sworn to the 22nd day of September, 1930, and the affidavit of Edward N. Smith, duly sworn to the 22nd day of September, 1930, and the affidavit of Charles Shultz, duly sworn to the 15th day of September, 1930, and the affidavit of James W. Lanigan, duly sworn to the 18th day of September, 1930, submitted in opposition thereto, and due deliberation having been had thereon, and the Court [fol. 148] having rendered its decision and opinion in writing, dated the 1st day of October, 1930, sustaining said exceptions and granting said motion of respondent;

And a petition for rehearing having been thereupon filed herein by libelant and submitted to the Court and due deliberation having been had thereon, and the Court having filed its further decision and opinion in writing thereon dated January 2nd, 1931, denying said petition for rehearing and directing the entry of an order declining jurisdiction herein as heretofore directed by its said original decision and opinion; and the costs of respondent having been duly taxed at the sum of $433.50; and the court having ordered that libelant pay one-half (½) the amount of such taxed costs:

Now, on motion of Stanley & Gidley, proctors for the respondent, it is

Ordered, adjudged, and decreed that the respondent's exceptions to the libel herein be and they hereby are sustained; and it is further

Ordered, adjudged, and decreed that this United States District Court for the Western District of New York does hereby decline and refuse to take and entertain further jurisdiction of the above entitled action; and it is further

Ordered, adjudged, and decreed that the libel herein be [fol. 149] and the same hereby is dismissed with one-half costs, and the writ of foreign attachment heretofore

granted and served herein at the Port of Buffalo upon Str. Lachinedoc, the property of respondent, on or about the 21st day of July, 1930, be and the same hereby is vacated; and it is further

Ordered, adjudged, and decreed that libelant be and it hereby is remitted to its remedies in the Courts of the Dominion of Canada; and it is further

Ordered, adjudged, and decreed upon the entry of this order and decree, respondent shall appear in any action brought by libelant in the Admiralty Courts of the Dominion of Canada for the recovery of the damages herein sought to be recovered, and that in any such action respondent shall file valid surety company bond in a like amount as herein furnished as security for whatever claim in damages libelant may have; and it is further

Ordered, adjudged and decreed that in the event that libelant shall fail to perfect an appeal from this decree within the period of three months next succeeding the date of entry hereof, then the bond and stipulation heretofore given herein with American Surety Company as surety for the release of the Str. Lachinedoc from arrest and attachment under the writ of foreign attachment heretofore issued and served herein upon the prayer of libelant, be forthwith cancelled and discharged of record upon the ex- [fol. 150] piration of said period of three months; that in the event that libelant shall so perfect an appeal from this decree within said period, then said bond and stipulation shall not be cancelled and discharged of record herein until the expiration of a reasonable time following the rendition of final decision upon such appeal within which libelant may institute such action in the Courts of the Dominion of Canada; whereupon said bond and stipulation may be cancelled of record upon application to this Court upon two days' notice.

Ordered, adjudged, and decreed that the respondent Paterson Steamships Limited, recover of and from libelant Canada Malting Company Limited, and its stipulators, one-half the sum of $433.50, its costs as taxed with interest thereon until paid and that it have judgment and execution therefor; and it is further

Ordered, that unless this decree be satisfied or an appeal be taken therefrom within ten days after service of a copy thereof on the proctors for libelant, execution may issue

against the libelant and its stipulators for costs, their goods, chattels, credits and lands, to enforce satisfaction of this decree.

John R. Hazel, U. S. D. J.

The foregoing is approved as to form.
Bigham, Englar, Jones & Houston, Brown, Ely & Richards, Proctors for Libelant.

[fol. 151] IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

In Admiralty

BRITISH EMPIRE GRAIN COMPANY, LIMITED, Libelant,

vs.

PATERSON STEAMSHIPS, LIMITED, Respondent

FINAL DECREE DISMISSING LIBEL OF BRITISH EMPIRE GRAIN COMPANY, LIMITED—Jan. 12, 1931

The respondent having filed bond and notice of appearance herein following attachment of respondent's Str. Lachinedoc herein, and having further filed exceptions to the libel herein, together with its suggestion that the Court ought not to entertain or exercise further jurisdiction over the above entitled action by reason of the matters and things therein stated, and respondent having made a motion for an order and decree of this Court, decreeing that [fol. 152] the Court exercise the discretion conferred upon it by operation of law and refuse to take and entertain further jurisdiction of the above entitled action, and further that the Court dismiss the libel herein and vacate the writ of foreign attachment heretofore granted and served herein at the Port of Buffalo upon the Str. Lachinedoc, the property of respondent Paterson Steamships, Limited; and further that the Court remit libelant to its remedies in the Courts of the Dominion of Canada; and further that the Court direct that the bond and stipulation heretofore given and filed herein by respondent Paterson Steamships Limited, with American Surety Company of New York as surety, for the release of the Str. Lachinedoc from arrest and attachment under the writ of foreign attachment heretofore issued and served herein upon the prayer of libelant,

be cancelled and discharged of record and that the Clerk of this Court so mark said bond and stipulation; and further for such other and further relief herein as may be incidental thereto or proper in the premises, and said motion being returnable upon the 15th day of September, 1930, said day being the return day of process issued upon the libel filed herein, and said exceptions and motion having duly come on to be heard upon said 15th day of September, 1930, and having been duly adjourned until the 22nd day of September, 1930, by stipulation made at the request of proctors for libelant, and having thereafter duly come on to [fol. 153] be heard upon said 22nd day of September, 1930, and having been duly argued and submitted by Ellis H. Gidley, Esq., and Ray M. Stanley, Esq., of counsel for respondent in support thereof, and by Leonard J. Matteson, Esq., of counsel for libelant in opposition thereto;

And on reading and filing the said exceptions together with the suggestion of the respondent and the notice of said motion, the affidavit of Erwin Burton Sutherland, duly sworn to the 6th day of September, 1930; the affidavit of William W. Hall, duly sworn to the 4th day of September, 1930; the affidavit of Rufus Clement Holden, Jr., duly sworn to the 4th day of September, 1930; the affidavit of George D. MacDonald, duly sworn to the 8th day of September, 1930; the affidavit of Ellis H. Gidley, duly sworn to the 8th day of September, 1930, with proof of due service thereof upon the proctors for libelant, and upon the libel filed herein and the writ of foreign attachment heretofore issued out of this Court and the return of the Marshal thereto, and the notice of appearance filed by respondent, in support of said exceptions and motion; and on reading and filing the affidavit of Andrew J. McElhinney, duly sworn to the 22nd day of September, 1930, and the affidavit of Edward N. Smith, duly sworn to the 22nd day of September, 1930, and the affidavit of Charles Shultz, duly sworn to the 15th day of September, 1930, and the affidavit of James W. Lanigan, duly sworn to the 18th day of September, 1930, submitted in opposition thereto, and due deliberation hav- [fol. 154] ing been had thereon, and the Court having rendered its decision and opinion in writing, dated the 1st day of October, 1930, sustaining said exceptions and granting said motion of respondent;

And a petition for rehearing having been thereupon filed herein by libelant and submitted to the Court and due

deliberation having been had thereon, and the Court having filed its further decision and opinion in writing thereon dated January 2nd, 1931, denying said petition for rehearing and directing the entry of an order declining jurisdiction herein as heretofore directed by its said original decision and opinion; and the costs of respondent having been duly taxed at the sum of $158.49, and the Court having ordered that libelant pay one-half (½) the amount of such taxed costs:

Now, on motion of Stanley & Gidley, proctors for the respondent, it is

Ordered, adjudged and decreed that the respondent's exceptions to the libel herein be and they hereby are sustained; and it is further

Ordered, adjudged, and decreed that this United States District Court for the Western District of New York does hereby decline and refuse to take and entertain further jurisdiction of the above entitled action; and it is further [fol. 155] Ordered, adjudged, and decreed that the libel herein be and the same hereby is dismissed with one-half costs, and the writ of foreign attachment heretofore granted and served herein at the Port of Buffalo upon the Str. Lachinedoc, the property of respondent, on or about the 21st day of July, 1930, be and the same hereby is vacated; and it is further

Ordered, adjudged, and decreed that libelant be and it hereby is remitted to its remedies in the Courts of the Dominion of Canada; and it is further

Ordered, adjudged, and decreed upon the entry of this order and decree, respondent shall appear in any action brought by libelant in the Admiralty Courts of the Dominion of Canada for the recovery of the damages herein sought to be recovered, and that in any such action respondent shall file valid surety company bond in a like amount as herein furnished as security for whatever claim in damages libelant may have; and it is further

Ordered, adjudged, and decreed that in the event that libelant shall fail to perfect an appeal from this decree within the period of three months next succeeding the date of entry hereof, then the bond and stipulation heretofore given herein with American Surety Company as surety for the release of the Str. Lachinedoc from arrest and attachment under the writ of foreign attachment heretofore

[fol. 156] issued and served herein upon the prayer of libelant, be forthwith cancelled and discharged of record upon the expiration of said period of three months; that in the event that libelant shall so perfect an appeal from this decree within said period, then said bond and stipulation shall not be cancelled and discharged of record herein until the expiration of a reasonable time following the rendition of final decision upon such appeal within which libelant may institute such action in the Courts of the Dominion of Canada, whereupon said bond and stipulation may be cancelled of record upon application to this Court upon two days' notice.

Ordered, adjudged, and decreed that the respondent Paterson Steamships Limited, recover of and from libelant British Empire Grain Company, Limited, and its stipulators, one-half the sum of $158.49, its costs as taxed with interest thereon until paid and that it have judgment and execution therefor; and it is further

Ordered that unless this decree be satisfied or an appeal be taken therefrom within ten days after service of a copy thereof on the proctors for libelant, execution may issue against the libelant and its stipulators for costs, their goods, chattels, credits and lands, to enforce satisfaction of this decree.

John R. Hazel, U. S. D. J.

The foregoing is approved as to form.
Bigham, Englar, Jones & Houston, Brown, Ely & Richards, Proctors for Libelant.

[fol. 157] In United States District Court, Western District of New York

In Admiralty

Henry K. Starnes, Doing Business as H. K. Starnes & Co., Libelant,

vs.

Paterson Steamships Limited, Respondent.

Final Decree Dismissing Libel of Henry K. Starnes—Jan. 12, 1931

The respondent having filed bond and notice of appearance herein following attachment of respondent's Str.

Lachinedoc herein, and having further filed exceptions to the libel herein, together with its suggestion that the Court ought not to entertain or exercise further jurisdiction over the above entitled action by reason of the matters and things therein stated, and respondent having made a motion for an order and decree of this Court, decreeing that the Court exercise the discretion conferred upon it by [fol. 158] operation of law and refuse to take and entertain further jurisdiction of the above entitled action, and further that the Court dismiss the libel herein and vacate the writ of foreign attachment heretofore granted and served herein at the Port of Buffalo upon the Str. Lachinedoc, the property of respondent Paterson Steamships Limited; and further that the Court remit libelant to its remedies in the Courts of the Dominion of Canada; and further that the Court direct that the bond and stipulation heretofore given and filed herein by respondent Paterson Steamships Limited, with American Surety Company of New York as surety, for the release of the Str. Lachinedoc from arrest and attachment under the writ of foreign attachment heretofore issued and served herein upon the prayer of libelant, be cancelled and discharged of record and that the Clerk of this Court so mark said bond and stipulation; and further for such other and further relief herein as may be incidental thereto or proper in the premises, and said motion being returnable upon the 15th day of September, 1930, said day being the return day of process issued upon the libel filed herein, and said exceptions and motion having duly come on to be heard upon said 15th day of September, 1930, and having been duly adjourned until the 22nd day of September, 1930, by stipulation made at the request of proctors for libelant, and having thereafter duly come on to be heard upon said 22nd day of September, 1930, and having been duly argued and submitted by Ellis H. Gidley, [fol. 159] Esq., and Ray M. Stanley, Esq., of Counsel for respondent in support thereof, and by Leonard J. Matteson, Esq., of Counsel for libelant in opposition thereto;

And on reading and filing the said exceptions together with the suggestion of the respondent and the notice of said motion, the affidavit of Erwin Burton Sutherland, duly sworn to the 6th day of September, 1930; the affidavit of William W. Hall, duly sworn to the 4th day of September, 1930; the affidavit of Rufus Clement Holden, Jr., duly sworn

to the 4th day of September, 1930; the affidavit of George D. MacDonald, duly sworn to the 8th day of September, 1930; the affidavit of Ellis H. Gidley, duly sworn to the 8th day of September, 1930, with proof of due service thereof upon the proctors for libelant, and upon the libel filed herein and the writ of foreign attachment heretofore issued out of this Court and the return of the Marshal thereto, and the notice of appearance filed by respondent, in support of said exceptions and motion; and on reading and filing the affidavit of Andrew J. McElhinney, duly sworn to the 22nd day of September, 1930, and the affidavit of Edward N. Smith, duly sworn to the 22nd day of September, 1930, and the affidavit of Charles Shultz, duly sworn to the 15th day of September, 1930, and the affidavit of James W. Lanigan, duly sworn to the 18th day of September, 1930, submitted in opposition thereto, and due deliberation having been [fol. 160] had thereon, and the Court having rendered its decision and opinion in writing, dated the 1st day of October, 1930, sustaining said exceptions and granting said motion of respondent;

And a petition for rehearing having been thereupon filed herein by libelant and submitted to the Court and due deliberation having been had thereon, and the Court having filed its further decision and opinion in writing thereon dated January 2nd, 1931, denying said petition for rehearing and directing the entry of an order declining jurisdiction herein as heretofore directed by its said original decision and opinion; and the costs of respondent having been duly taxed at the sum of $106.33, and the Court having ordered that the libelant pay one-half (½) the amount of such taxed costs;

Now, on motion of Stanley & Gidley, proctors for the respondent, it is

Ordered, adjudged and decreed that the respondent's exceptions to the libel herein be and they hereby are sustained; and it is further

Ordered, adjudged and decreed that this United States District Court for the Western District of New York does hereby decline and refuse to take and entertain further jurisdiction of the above entitled action; and it is further

Ordered, adjudged and decreed that the libel herein be and the same hereby is dismissed with one-half costs, and [fol. 161] the writ of foreign attachment heretofore granted

and served herein at the Port of Buffalo upon the Str. Lachinedoc, the property of respondent, on or about the 21st day of July, 1930, be and the same hereby is vacated; and it is further

Ordered, adjudged and decreed that libelant be and it hereby is remitted to its remedies in the Courts of the Dominion of Canada; and it is further

Ordered, adjudged and decreed upon the entry of this order and decree, respondent shall appear in any action brought by libelant in the Admiralty Courts of the Dominion of Canada for the recovery of the damages herein sought to be recovered, and that in any such action respondent shall file valid surety company bond in a like amount as herein furnished as security for whatever claim in damages libelant may have; and it is further

Ordered, adjudged and decreed that in the event that libelant shall fail to perfect an appeal from this decree within the period of three months next succeeding the date of entry hereof, then the bond and stipulation heretofore given herein with American Surety Company as surety for the release of the Str. Lachinedoc from arrest and attachment under the writ of foreign attachment heretofore issued and served herein upon the prayer of libelant, be forthwith cancelled and discharged of record upon the ex-[fol. 162] piration of said period of three months; that in the event that libelant shall so perfect an appeal from this decree within said period, then said bond and stipulation shall not be cancelled and discharged of record herein until the expiration of a reasonable time following the rendition of final decision upon such appeal within which libelant may institute such action in the Courts of the Dominion of Canada, whereupon said bond and stipulation may be cancelled of record upon application to this Court upon two days' notice.

Ordered, adjudged and decreed that the respondent Paterson Steamships Limited, recover of and from libelant Henry K. Starnes, doing business as H. K. Starnes & Co., and its stipulators, one-half the sum of $106.33 its costs as taxed, with interest thereon until paid and that it have judgment and execution therefor; and it is further

Ordered that unless this decree be satisfied or an appeal be taken therefrom within ten days after service of a copy thereof on the proctors for libelant, execution may issue

against the libelant and its stipulators for costs, their goods, chattels, credits and lands, to enforce satisfaction of this decree.

John R. Hazel, U. S. D. J.

Approved as to form.
Bigham, Englar, Jones & Houston, Brown, Ely & Richards, Proctors for Libelant.

[fol. 163] IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

CANADA MALTING COMPANY, LIMITED, Libellant,

against

PATERSON STEAMSHIPS, LIMITED, Respondent

NOTICE OF APPEAL FROM FINAL DECREE DISMISSING LIBEL OF CANADA MALTING COMPANY, LIMITED

SIRS: Please take notice that the libellant herein, Canada Malting Company, Limited, hereby appeals to the United States Circuit Court of Appeals for the Second Circuit from the final decree entered herein on or about the 20th day of January, 1931, and from each and every part of said decree.

Dated New York, March 23, 1931.

Yours, etc., Brown, Ely & Richards, 1317 Chamber of Commerce, Buffalo, New York; Bigham, Englar, Jones & Houston, 64 Wall Street, New York City (Proctors for Libellant).

[fol. 164] To May C. Sickmon, Clerk of the Court; Messrs. Stanley & Gidley, Proctors for Respondent, Buffalo, New York.

The foregoing appeal is hereby allowed.
March 25, 1931.

(Sgd.) Simon L. Adler, U. S. D. J.

IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

BRITISH EMPIRE GRAIN COMPANY, Libellant,

against

PATERSON STEAMSHIPS, LIMITED, Respondent

NOTICE OF APPEAL FROM FINAL DECREE DISMISSING LIBEL OF BRITISH EMPIRE GRAIN COMPANY, LIMITED

SIRS: Please take notice that the libellant herein, British Empire Grain Company, hereby appeals to the United States Circuit Court of Appeals for the Second Circuit [fol. 165] from the final decree entered herein on or about the 20th day of January, 1931, and from each and every part of said decree.

Dated New York, March 23, 1931.

Yours, etc., Brown, Ely & Richards, 1317 Chamber of Commerce, Buffalo, New York; Bigham, Englar, Jones & Houston, 64 Wall Street, New York City (Proctors for Libellant).

To May C. Sickmon, Clerk of the Court; Messrs. Stanley & Gidley, Proctors for Respondent, Buffalo, New York.

The foregoing appeal is hereby allowed.
March 25, 1931.

(Sgd.) Simon L. Adler, U. S. D. J.

[fol. 166] IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

HENRY K. STARNES, Doing Business as H. K. Starnes & Company, Libellant,

against

PATERSON STEAMSHIPS, LIMITED, Respondent

NOTICE OF APPEAL FROM FINAL DECREE DISMISSING LIBEL OF HENRY K. STARNES

SIRS: Please take notice that the libellant herein, Henry K. Starnes, doing business as H. K. Starnes & Company,

hereby appeals to the United States Circuit Court of Appeals for the Second Circuit from the final decree entered herein on or about the 20th day of January, 1931, and from each and every part of said decree.

Dated New York, March 23, 1931.

Yours, etc., Brown, Ely & Richards, 1317 Chamber of Commerce, Buffalo, New York; Bigham, Englar, Jones & Houston, 64 Wall Street, New York City (Proctors for Libellant).

[fol. 167] To May C. Sickmon, Clerk of the Court; Messrs. Stanley & Gidley, Proctors for Respondent, Buffalo, New York.

The foregoing appeal is hereby allowed.

March 25, 1931.

(Sgd.) Simon L. Adler, U. S. D. J.

In United States District Court, Western District of New York

Canada Malting Company Limited, Libellant,

against

Paterson Steamships, Limited, Respondent

Assignments of Error

The libellant herein, Canada Malting Company, Limited, hereby assigns error in the decisions and decree of the District Court for the Western District of New York in the above entitled action as follows:

1. In that the Court entered a decree in favor of respondent sustaining the exceptions and dismissing the complaint.

[fol. 168] 2. In that the Court held that the question whether jurisdiction should be retained was discretionary.

3. In that the Court failed to hold that since the collision occurred within the territorial waters of the United States, retention of jurisdiction was mandatory.

4. In that the Court held that the fact that another action had been instituted in a Canadian Court of Admiralty by the respondent herein after the institution of the present action and concerning the same cause of action, was a reason for failing to retain jurisdiction.

5. In that the Court held that the pendency of the action brought by the respondent in a Canadian Court of Admiralty might lead to multiplicity of actions and antagonistic determinations and that this was a valid reason for refusing to retain jurisdiction.

6. In that the Court failed to hold that the institution of suit by the respondent in a Canadian Court of Admiralty relating to the same cause of action after the institution of the present suit did not constitute a valid reason for refusing to retain jurisdiction.

7. In that the Court held that the fact that libellant would recover only one-half of its damage in a Canadian [fol. 169] Court of Admiralty in the event of a decision that both vessels were at fault did not constitute sufficient reason for retaining jurisdiction.

8. In that the Court required libellant to show that an injustice would be done if the case were remitted to the Canadian Court instead of requiring respondent to prove that an injustice would be done if jurisdiction was retained by this Court.

9. In that the Court held that the fact that testimony was taken before the Canadian Wreck Commissioner's Court and a decision was reached by that Court holding both vessels at fault constituted a reason for declining jurisdiction.

10. In that the Court held in the event of a decision of both vessels at fault, a recovery in full for libellant's damages would be made against respondent, but respondent would have no effective remedy for recoupment of one-half of this damage from the other colliding vessel or her owner and that another action by respondent would be necessary to enforce contribution.

11. In that the Court failed to hold that in the event of a decision by this Court holding both vessels at fault, respondent could have recoupment and contribution of one-

half of libellant's damages by instituting suit in the Courts of the United States or by filing a petition under the 56th Rule in the present suit against the other colliding vessel or her owner.

[fol. 170] 12. In that the Court held that the fact that by treaty entered into between the United States and Canada the waters in which the collision occurred are open to free navigation by the citizens of both countries, constituted a reason for declining jurisdiction.

13. In that the Court held that the right to take or refuse jurisdiction for special reasons in the present case is recognized in the case of The Belgenland, 114 U. S. 355.

14. In that the Court improperly applied the principle that in cases of collision on the high seas between foreign vessels the retention of jurisdiction is discretionary in the present case of a collision occurring within the territorial waters of the United States.

15. In that even if the case was one in which the retention of jurisdiction was discretionary, the Court abused its discretion in remanding the cases to the Canadian Courts instead of retaining jurisdiction.

16. In that the Court failed to hold that remanding the cases to the Canadian Courts would not result in any advantage to respondent, but would result in a serious disadvantage and injustice to libellant.

17. In that the Court failed to hold that since the collision occurred within the territorial waters of the United [fol. 171] States, the laws of the United States relating to the rights and liabilities of the parties is controlling, and that accordingly the Courts of the United States should interpret and apply these laws.

18. In that the Court failed to hold that the libellant was entitled to choose the forum for its suit.

19. In that the Court failed to find that the two colliding vessels and their owners submitted themselves to the jurisdiction of the Courts of the United States by navigating within the territorial waters of the United States.

20. In that the Court failed to hold that by filing a general appearance respondent waived any right to question the jurisdiction of the Court.

21. In that the Court failed to hold that by remanding the case to the Canadian Court, libellant's rights would be seriously prejudiced because of the greater amount of delay which would be encountered in the Canadian Courts in the hearing and determination of this action.

22. In that the Court failed to hold that even if the question of whether jurisdiction should be retained was discretionary, it was the duty of the respondent to show strong reasons before jurisdiction would be declined.

[fol. 172]. 23. In that the Court failed to hold that respondent did not show that an injustice would be done to respondent if jurisdiction were retained.

24. In that the Court in effect placed the burden on the libellant of showing good cause why jurisdiction should be retained and failed to place the burden on respondent of showing good cause why the Court should refuse to retain jurisdiction.

25. In that the Court failed to overrule the exceptions to the libel.

Brown, Ely & Richards, 1317 Chamber of Commerce, Buffalo, New York. Bigham, Englar, Jones & Houston, 64 Wall Street, New York, N. Y. (Proctors for Libellant).

[fol. 173] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

CANADA MALTING COMPANY, LIMITED, Libellant-Appellant,

vs.

PATERSON STEAMSHIPS, LIMITED, Respondent-Appellee

BRITISH EMPIRE GRAIN COMPANY, LIMITED, Libellant-Appellant,

vs.

PATERSON STEAMSHIPS, LIMITED, Respondent-Appellee

HENRY K. STARNES, Libellant-Appellant,

vs.

PATERSON STEAMSHIPS, LIMITED, Respondent-Appellee

STIPULATION AS TO OMISSIONS FROM THE PRINTED RECORD

It is hereby stipulated by and between the proctors for the appellants and the appellee above named, that from the printed record in the above appeals there may be omitted the following:

First. With respect to the suit brought by British Empire Grain Company, Limited, the suggestion, exceptions [fol. 174] to the libel filed by the respondent-appellee and the supporting affidavits annexed to its notice of motion in said suit, and the affidavits of Andrew J. McElhinney, Edward N. Smith, Charles Schultz and James W. Lanigan filed by libellant-appellant, it being stipulated that said suggestion, exceptions and affidavits are in form identical with those filed in the suit brought by Canada Malting Company, Limited.

Second. With respect to the suit brought by Henry K. Starnes, the copy of the report of the Dominion Wreck Commissioner annexed to affidavit of Ellis H. Gidley, and the affidavits of Andrew J. McElhinney, Edward N. Smith, Charles Schultz and James W. Lanigan, it being stipulated that the copy of said report and of said affidavits are in form identical with those filed in the suit brought by Canada Malting Company, Limited.

Third. That part of the petition for rehearing filed by libellant-appellants commencing near the foot of page two thereof with the words "First Ground", down to the words "respectfully submitted" on the last page of the petition, it being stipulated that the balance of the petition consisting entirely of argument on the law of the case is omitted.

Fourth. The assignments of error filed by British Empire Grain Company, Limited, it being stipulated they are [fol. 175] in form identical with those relating to the decree dismissing the libel of Canada Malting Company, Limited.

Fifth. The assignments of error filed by Henry K. Starnes, it being stipulated they are in form identical with

those relating to the decree dismissing the libel of Canada Malting Company, Limited.

Dated April 2nd, 1931.

Bigham, Englar, Jones & Houston, Brown, Ely & Richards, Proctors for Libellants-Appellants.
Stanley & Gidley, Proctors for Respondent-Appellee.

STIPULATION AS TO RECORD ON APPEAL

It is hereby stipulated by the proctors for the parties, that the foregoing is a true transcript of the record on appeal herein, as agreed upon by the parties.

Dated Buffalo, N. Y., April 18, 1931.

Bigham, Englar, Jones & Houston, Brown, Ely & Richards, Proctors for Libellants-Appellants.
Stanley & Gidley, Proctors for Respondent-Appellee.

[fol. 176] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 177] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

CANADA MALTING COMPANY, LTD., Libellant-Appellant,

vs.

PATERSON STEAMSHIPS, LTD., Respondent-Appellee

BRITISH EMPIRE GRAIN COMPANY, LTD., Libellant-Appellant,

vs.

PATERSON STEAMSHIPS, LTD., Respondent-Appellee

HENRY K. STARNES, Doing Business as H. K. Starnes & Company, Libellant-Appellant,

vs.

PATERSON STEAMSHIPS, LTD., Respondent-Appellee

Before Manton, Swan and Chase, Circuit Judges

Appeals from the District Court of the United States for the Western District of New York

Separate libels in personam were begun by foreign attachment against Paterson Steamships, Ltd., a Canadian

corporation, by three libellants, two of whom were Canadian corporations, and the third a resident of Canada. On respondent's exceptions, suggestion that the court should decline jurisdiction, and motion to dismiss, a final decree was entered in each suit dismissing the libel. The libellants have appealed. Decrees affirmed.

For opinion below see 49 F. (2d) 802.

[fol. 178] Bigham, Englar, Jones & Houston, Proctors for Appellants. Leonard J. Matteson, Lawrence E. Coffey, Andrew J. McElhinney, of Counsel.

Stanley & Gidley, Proctors for Appellee.

OPINION

SWAN, Circuit Judge:

These cases come before us upon the allegations of the libels, admitted by respondent's exceptions, and upon the facts stated in supporting and opposing affidavits filed on the motion to decline jurisdiction and dismiss the libels. The three suits are alike. Each libellant was an owner of cargo shipped under a Canadian bill of lading for transportation on the steamer Yorkton from one Canadian port to another, and lost in consequence of a collision between the carrying vessel and the respondent's steamer Mantadoc. The collision was alleged to have been caused by faults of the Mantadoc. It occurred in Lake Superior on the American side of the international boundary, and the Yorkton was so badly damaged that she sank, her cargo becoming a total loss. Both vessels were of Canadian registry and each was owned by a Canadian corporation. An investigation conducted at Toronto by the Dominion Wreck Commissioner resulted in a finding that the masters of both vessels were at fault. Immediately after the libels were filed in the court below, the respondent began a suit, which is still pending, in a Canadian admiralty court against the owner of the Yorkton to recover collision damages suffered by the Mantadoc.

Upon the filing of the libels and the seizure under writ of foreign attachment of the respondent's vessel Lachinedoc at the port of Buffalo, the respondent appeared [fol. 179] generally and filed stipulations for release of its vessel. Before the return day it excepted to the libels and

moved for a dismissal of the suits. After hearing upon libels, exceptions and affidavits the motion was granted.

Not only are the libellants and the respondent Canadian subjects but the officers and most, if not all, the members of the crew of each vessel are residents of Canada and so not available for compulsory attendance as witnesses in the district court. This was considered an important consideration by the court below as was also the fact that under our law an innocent cargo owner can recover full damages from the non-carrying vessel, if both the colliding vessels were at fault (The New York, 175 U. S. 187, 208), while under the Canadian law, it is asserted, only half damages would be recoverable from the respondent. The Yorkton has been salvaged and it is contended by libellants that under the rule of The Chattahoochee, 173 U. S. 540, the respondent could implead the owner of the Yorkton and recoup one half of its liability to cargo owners, but there is a dispute whether the salved value of the Yorkton would afford the respondent adequate protection so that the maintenance of the libels here would be no more disadvantage financially than suits by the cargo owners in Canada. The respondent offered, if the libellants were remitted to their home forum, to appear and give adequate security in any suits they might there bring upon their cargo claims, and the decrees below directed the respondent to perform this offer. No one has questioned this feature of the decrees and we say nothing as to it.

The appellants advance two propositions as reasons for [fol. 180] reversal of the decrees of dismissal: first, that the district court had no discretion to decline jurisdiction, and, second, that even if it had, dismissal of the suits was an abuse of discretion.

The argument in support of the first proposition is grounded upon the assertion that since the collision occurred within territorial waters of the United States, the rights and obligations of the parties are to be determined by the law of the place where the tort was committed. Smith v. Condry, 1 How. 28, 32; Slater v. Mexican National R. R. Co., 194 U. S. 120, 126; New York Central v. Chisholm, 268 U. S. 29, 32. It is conceded that in suits between foreigners a court of admiralty may for good cause decline to retain jurisdiction provided the law to be applied is foreign law, but it is contended that when a maritime tort is

governed by the law of the forum, retention of jurisdiction is mandatory.

The most recent statements of the Supreme Court upon the subject do not assert the limitation for which the appellants contend. In Charter Shipping Co. v. Bowring, 281 U. S. 515, 517, it is said:

"The retention of jurisdiction of a suit in admiralty between foreigners is within the discretion of the District Court. The exercise of its discretion may not be disturbed unless abused. The Belgenland, 114 U. S. 355, 368; the Maggie Hammond, 9 Wall. 435, 457."

A similarly broad dictum is repeated in Langnes v. Green, 282 U. S. 531, 544, where it is said that although admiralty courts have complete jurisdiction over suits of a maritime nature between foreigners,

"nevertheless the question is one of discretion in every case, and the court will not take cognizance of the case if justice would be as well done by remitting the parties to their home forum."

[fol. 181] But the appellants contend that these statements should not be given so broad a scope as they bear on their face. In the Bowring case foreign law was involved, as the court noticed in a paragraph of its opinion which appears on page 518:

"Both parties being British subjects and the present litigation, as well as the suit pending abroad, apparently involving the application of English law to the fund located there, it was for the District Court to say, as it did, upon a consideration of all the circumstances, whether it should decline 'to take cognizance of the case if justice would be done as well by remittting the parties to the home forum'. See The Maggie Hammond, supra, p. 457."

Similarly, the dictum quoted from Langnes v. Green, supra, is followed by the statement:

"So, while the courts of this country have and may entertain jurisdiction of actions between non-resident foreigners for torts committed in a foreign country, they will exercise such jurisdiction in their discretion and only in special cases."

And it must be admitted that earlier opinions of the Supreme Court left open the question whether discretion to decline jurisdiction would exist if the tort was committed within the United States. In the Belgenland, 114 U. S. 355, at 363, it is said that circumstances often exist which render it inexpedient for the court to take jurisdiction of "controversies between foreigners in cases not arising in the country of the forum"; and again, at page 365, that courts will use a discretion about assuming jurisdiction of "controversies between foreigners in cases arising beyond the territorial jurisdiction of the country to which the courts belong." See also The Maggie Hammond, 9 Wall. 435, 457.

The appellants have cited but one case which has applied the limitation on discretionary jurisdiction for which they contend. In The Apurimac, 7 F. (2d) 741 (E. D. Va.), [fol. 182] Judge Groner seems to have held that jurisdiction was mandatory in a libel for negligent injury to a foreign seaman on a foreign vessel within an American port and so governed by local law. On appeal, however, the decree was affirmed on the ground that jurisdiction was discretionary but discretion was not abused in retaining the suit. Heredia v. Davies, 12 F. (2d) 500 (C. C. A. 4). Whether we should feel at liberty, despite the language used in the recent Supreme Court decisions, to adopt the appellants' contention we need not say. Concededly, the limitation exists only if the law of the forum is the law determining the rights and obligations of the parties.

If the collision had occurred on the high seas, there can be no doubt that the retention of jurisdiction would be a matter of discretion. When two vessels of the same nationality collide upon the high seas the law enforced by the folum will be the law of the flag. The Scotland, 105 U. S. 24, 29; The Eagle Point, 142 F. 453 (C. C. A. 3), cert. denied, 201 U. S. 644. Under the terms of the treaty between Great Britain and the United States (36 Stat. 2448) the waters of the Great Lakes are equally free to citizens of either Canada or the United States and we think collisions in those waters are to be dealt with as though on the high seas. The Eagle, 8 Wall. 15. That was a suit in rem for a collision between American vessels on the Canadian side of the international boundary. It was urged that Canadian law which gave no lien should apply but the court held the

suit should be tried according to the practice and principles of admiralty in this country irrespective of Canadian law. Mr. Justice Nelson, who wrote the opinion, distinguished [fol. 183] a collision on the Great Lakes from a collision within a port. In the latter case there are local rules and usages which should be observed by all who enter the port. He called such cases "exceptional", and applied the admiralty law of the United States to a collision on the Canadian side of the waterway, as would have been done if the collision had been on the high seas. This case was carefully considered in The Avon, Fed. Cas. No. 680 (N. D. Ohio). That was an action in rem by an American ship against a British ship owned and registered in Ontario, for a collision on the Welland Canal, which is within Canadian territory and connects Lakes Erie and Ontario. The contention of the claimant was that the libel must be dismissed because Ontario law governed (being the lex loci delicti) and Ontario law did not give an action in rem. The court held to the contrary, and in speaking of the case of The Eagle, supra, said:

"It occurred in boundary waters, the vessels were all American, exercising an international right in circumstances where, without exception, it has ever been held the local laws were not applicable."

See also, Thompson Towing & Wrecking Ass'n v. McGregor, 207 F. 209, 217 (C. C. A. 6); cf. The Kaiser Wilhelm der Grosse, 175 F. 215 (S. D. N. Y.); The West Cherow, 276 F. 585 (E. D. Va.). Consequently, we think the rights and obligations of the litigants should be determined as though the collision had occurred on the high seas, that is, by the law of their common flag.

If, as we hold, the court had discretion whether or not to entertain jurisdiction, we cannot find any abuse of it in remitting the parties to their home forum. See The New Texas, 1926 A. M. C. 1514 (E. D. N. Y.); Goldman v. Furness Withy & Co., 101 F. 467 (S. D. N. Y.); The Iquitos, [fols. 184 & 185] 286 F. 383 (W. D. Wash.); Charter Shipping Co. v. Bowring, supra.

Accordingly the decrees are affirmed.

[fol. 186] IN UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

CANADA MALTING COMPANY, LTD., Libellant-Appellant,

v.

PATERSON STEAMSHIPS, LTD., Respondent-Appellee

DECREE—Filed July 28, 1931

Appeal from the District Court of the United States for the Western District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Western District of New York and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be, and it hereby is, affirmed, with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[File endorsement omitted.]

[fol. 187] IN UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

BRITISH EMPIRE GRAIN COMPANY, LTD., Libellant-Appellant,

v.

PATERSON STEAMSHIPS, LTD., Respondent-Appellee

DECREE—Filed July 28, 1931

Appeal from the District Court of the United States for the Western District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Western District of New York and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be, and it hereby is, affirmed, with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 188] [File endorsement omitted.]

[fol. 189] In United States Circuit Court of Appeals, Second Circuit

Henry K. Starnes, Libellant-Appellant,

v.

Paterson Steamships, Ltd., Respondent-Appellee

Decree—Filed July 28, 1931

Appeal from the District Court of the United States for the Western District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Western District of New York and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be, and it hereby is, affirmed, with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 190] [File endorsement omitted.]

[fol. 191] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 192] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1931

No. 487

CANADA MALTING COMPANY, LTD., Petitioner,

vs.

PATERSON STEAMSHIPS, LTD.

ORDER ALLOWING CERTIORARI—Filed November 30, 1931

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 193] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1931

No. 488

BRITISH EMPIRE GRAIN COMPANY, LTD., Petitioner,

vs.

PATERSON STEAMSHIPS, LTD.

ORDER ALLOWING CERTIORARI—Filed November 30, 1931

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 194] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1931

No. 489

HENRY K. STARNES, Doing Business as H. K. Starnes & Company, Petitioner,

vs.

PATERSON STEAMSHIPS, LTD.

ORDER ALLOWING CERTIORARI—Filed November 30, 1931

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File Nos. 36,301, 36,302, 36,303. U. S. Circuit Court of Appeals, Second Circuit. Term No. 487. Canada Malting Company, Ltd., petitioner, vs. Paterson Steamships, Ltd. Term No. 488. British Empire Grain Company, Ltd., petitioner, vs. Paterson Steamships, Ltd. Term No. 489. Henry K. Starnes, doing business as H. K. Starnes & Company, petitioner, vs. Paterson Steamships, Ltd. Petition for writs of certiorari and exhibit thereto. Filed October 27, 1931. File Nos. 36,301, 36,302, 36,303.